IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, JOSEPH CHRISTOVAO, d/b/a Mercantum Trading Company, prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on December 21, 1976 and the order of the Supreme Court of the State of New York entered on August 3, 1976.

Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, Special Term, appended hereto, is not officially reported (Appendix A, pp. 1a-42a).* The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, appended hereto, is reported in 55 A.D. 2d 561 (Appendix A, pp. 5a-11a). The opinion of the New York Court of Appeals appended hereto is reported in 41 N.Y. 2d 338 (Appendix A, pp. 11a-13a).

Jurisdiction

The orders sought to be reviewed are those of the Supreme Court of the State of New York, entered August 3, 1976, dismissing the complaint on the grounds of inconvenient forum and lack of personal jurisdiction (Appendix B, pp. 16a-18a), and of the Appellate Division of the New York Supreme Court affirming the former order and entered December 21, 1976 (Appendix B, pp. 19a-20a). In addition, review is sought of the judgment entered pursuant to those orders (Appendix B, pp. 14a-15a).

The said orders and judgment are based upon the determinations of the New York State Supreme Court

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* Figures in parentheses refer to the record on appeal, certified and transmitted to this Court pursuant to Rule 21 of the Rules of the Supreme Court of the United States. Figures in parentheses with the letter "a" refer to pages in the Appendix to this petition. NOTE: Only portions of the affidavits of petitioner sworn to April 6, 1976 and May 4, 1976 have been included in the Appendix. Portions of the affidavit of April 6, 1976 are included at pp. 25a-29a of Appendix C; portions of the affidavit of May 4, 1976 are included at pp. 30a-33a of Appendix C. The entire affidavit of petitioner sworn to May 12, 1976 is included in Appendix C, pp. 34a-42a. The entire affidavits of April 6, 1976 and May 4, 1976 may be found in the record on appeal (April 6, 1976: pp. 70-94, with exhibits pp. 95-147; May 4, 1976: pp. 148-163 with attachments and exhibits, pp. 164-179.

applying the New York State statute providing for dismissal on the basis of inconvenient forum, and finding that Portugal was a more convenient forum, and that of the Appellate Division of the Supreme Court upholding the constitutionality of that statute and of its application in this action. Further, the orders and judgment appealed from rest upon the subsequent determination of the Court of Appeals of the State of New York dismissing petitioner's appeal thereto of right, on the ground that no substantial constitutional question is presented (Appendix B, p. 21a).

The Court of Appeals having declined to review the issue of the constitutionality of CPLR Rule 327, both on its face and as applied, the final determination of the Appellate Division necessarily upholding constitutionality represents the final judgment rendered by the highest Court of the State of New York in which a decision could be had. All avenues of appeal on this issue in the State Courts have been exhausted.

Following that determination, petitioner sought, and was denied, leave to appeal to the Court of Appeals, first by the Appellate Division (Appendix B, pp. 22a-23a), and then subsequently by the Court of Appeals (Appendix B, p. 24a). By order dated April 12, 1977, the Supreme Court of the State of New York, Appellate Division, First Department, denied petitioner's motion for leave to appeal to the New York Court of Appeals (Appendix B, pp. 22a-23a). No opinion was rendered. By order dated July 6, 1977, the New York Court of Appeals denied petitioner's motion for leave to appeal to the New York Court of Appeals (Appendix B, p. 24a). No opinion was rendered.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3).

Question Presented

1. Is Rule 327 of the Civil Practice Law and Rules of the State of New York unconstitutional, or, is it, as applied in this action, unconstitutional as repugnant to the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions involved are as follows:

Amendment XIV, § 1, to the United States Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdictiion thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 327, Civil Practice Law and Rules of Consolidated Laws of New York.

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

Statement

The instant action was commenced by petitioner on December 9, 1975, by personal service in Portugal of a summons and complaint upon each of the named foreign corporations, following the issuance of an order of attachment by the Supreme Court, New York County, dated November 17, 1975. Pursuant to the order of attachment, the petitioner levied on property of the value of some $185,000.00 consisting of obligations under letters of credit due to the defendant Unisul-Uniao de Coop. Transf. de Tomate do Sul do Tejo, S.t.R.L. ("Unisul"), in the State of New York, on November 18, 1975 and November 19, 1975 (1-2).

Petitioner's complaint alleges five causes of action as follows: First, the tortious and intentional destruction of petitioner's business; second, the breach of a joint venture agreement; third, an action for fraud; fourth, interference with third-party contractual relations, and fifth, the breach of a written agency agreement (2).

Respondents petitioned for removal of the action from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York. Following removal, respondents moved the District Court for summary judgment in the entire action based upon the merits; affidavits and memoranda of law in support of and in opposition to the motion were served and filed. Before that motion was decided, the action was remanded to the Supreme Court of the State of New York on the ground that the United States District Court lacked subject matter jurisdiction because neither petitioner nor respondents were citizens of the United States within the meaning of 28 U.S.C. § 1332 (81-84, 166, 171).

Not once through the entire proceeding in the United States District Court, or prior to removal thereto, did respondents claim that the District Court was an "incon-

venient forum" for them or that personal jurisdiction over respondents was lacking—the two bases for dismissal in the Courts of the State of New York.

Indeed, the willingness of respondents to employ the Courts situated in the State of New York where it suits their purposes is demonstrated by the fact that shortly after this action was instituted, the respondent Unisul commenced an action against a corporation wholly owned by petitioner, in the United States District Court for the Southern District of New York, literally across the street from the State Court. That action arises from facts and transactions involving the sale by the respondent Unisul of products of the other respondents in the State of New York in connection with the operation of respondents' business in New York and the United States and which transactions are an integral part of those in the action at bar (140-145).

Respondents' motion resulting in the orders and judgment from which this petition is taken was made following remand to the New York State Supreme Court. This motion represented for the first time in the entire proceeding that respondents made any assertion that the Courts of the State of New York were an inconvenient forum or that personal jurisdiction over respondents was lacking.

Further, the record on appeal is replete with instances demonstrating the usage by respondents of various tribunals located in the United States for the resolution of disputes arising out of the conduct and operation through petitioner of their business in the United States. Witness the applications before the United States Food and Drug Administration and arbitrations and insurance claims by respondents ( ). In addition, the undisputed record is that each order for the sale of respondents' products in the United States contained an arbitration clause for the resolution of disputes within the State of New York (173-176) and that even the written agency agreement

between respondents and petitioner provided for the arbitration disputes in the State of New York (146-147). The record demonstrates the readiness of respondents to utilize forums located in the State of New York and in the United States and the convenience of these forums both prior to and even following the making of respondents' motion below resulting in the orders and judgment from which this petition is taken.

This action directly involves the conduct of respondents' business, i.e., the sale of their food products in the United States through the petitioner as their exclusive representative, as well as the relationship between respondents and petitioner respecting the conduct of that business. It in no way involves a relationship for the conduct of business in Portugal.

Petitioner has been a resident of the State of New York for a continuous period in excess of 22 years. He has conducted his business, the sale of respondents' food products, through his New York office for a period of time in excess of 14 years (71). Each of the respondents, except the respondent Unisul, is a Portuguese agricultural cooperative. The respondent Unisul, formed by the other respondents in 1970, acts as the marketing arm for the other respondents. From approximately 1961 through 1975, respondents sold their products internationally. The products were sold in Canada and the United States through the petitioner as the exclusive sales representative of respondents (81).

Approximately 90%, measured in money volume, of respondents' products are regularly sold each year in international commerce throughout the world, and not in Portugal. During the years 1970 through 1975, 30% to 40% of respondents' international sales of $7,000,000 per year were made in the United States alone. Between the years 1972 and 1973, respondents' sales in the United States were in excess of $2,600,000 and $1,000,000, respec-

tively, from tomato paste alone (158). These sales generated commissions which constituted 90% of the gross receipts of the petitioner (144). The contention of respondents is that the United States, including the jurisdiction of New York therein, which has given them this extent of business patronage is inconvenient for purposes of determining a dispute arising out of the conduct of that business.

The political conditions existing in Portugal precluding the possibility of a fair trial for the petitioner have been well documented in the record. This is not demonstrated simply by affidavits of the petitioner, but it is admitted by the general manager of the respondent Unisul (Appendix C, pp. 27a-29a). Furthermore, the opinion of a former member of the faculty of the University of Lisbon, School of Law, Professor Manuel Jose Cortes Rosa, supports this conclusion (Appendix C, pp. 36a-49a). Indeed, the supreme law of Portugal, its Constitution, is the best evidence of the inability of those courts to dispense justice to the petitioner in this case, consistent with due process.

On April 25, 1974, a revolution in Portugal overthrew the established government. By March 11, 1975, a communist faction had asserted control over the government (Appendix C, p. 29a). In a letter to the petitioner dated dated March 25, 1975, by the general manager of the respondent Unisul, the events during the period were described. Fear prevented the exercise of freedom of speech. A director of one of the respondents was incarcerated. The general manager of another of the respondents was expelled (Appendix C, pp. 28a-29a).

In early 1975, virtually all of the directors of the respondent cooperatives were ousted from their offices by government dictate and replaced by individuals with strong allegiances to the new revolutionary government then in power. The names of the ousted directors and their replacements are detailed in the record (Appendix C, p.

28a). One of the directors supplied the petitioner with a Telex supporting petitioner's position in opposition to respondents' motion for summary judgment when this case was temporarily removed to the United States District Court. That director was thereafter threatened by agents of the respondents and received a legal process from the Ministry of the Portuguese government. It is the very relationship between the respondents and the Portuguese government that poses the problem. The problem is demonstrated in the expert opinion of Professor Manuel Jose Cortes Rosa (Appendix C, pp. 36a-49a). Professor Rosa points to three considerations which make a "fair trial" impossible for petitioner in Portugal: (1) a generalized breakdown in the rule of law; (2) the new "leftist" constitution of Portugal which grants a preferred legal status to the "working class" and, effectively, any entity identified with that class, and (3) conditions in the University's Law School.

Subsequent to March 1975, the date on which the communist faction asserted control over the country, large and small businessmen were arrested under the pretext of having committed acts of "economic sabotage". There was never any concrete foundation for the arrests, and even less reason for justifying the detention of these persons. In many cases, these businessmen were denied even the right to legally challenge these detentions. In marked contrast to this, adjudications involving workers or the working class were made by the so-called "Popular Tribunals". Politicized thugs were permitted to absolve workers of crimes as serious as murdering one's employer.

Perhaps the most convincing evidence that petitioner will be unable to obtain a fair trial in Portugal is the Portuguese Constitution itself. The basic provisions of the Portuguese Constitution which make this clear are as follows:

"Article 1. Portuguese Republic.

Portugal is a sovereign Republic based on the dignity of the human person and the will of the people and committed to its own transformation in a classless society."

"Article 9. Basic Tasks of the State.

• • •

c. To socialise the means of production and wealth, in forms appropriate to the characteristics of the present period of history, to create conditions permitting the promotion of the people's welfare and quality of life, especially those of the working classes, and to abolish exploitation and oppresssion of man by man."

"Article 10. Revolutionary Process.

• • •

2. In the economic field, the advance of the revolutionary process requires collectivisation of the principal means of production."

"Article 80. Foundation of the Economic and Social Organization.

The economic and social organisation of the Portuguese Republic shall be based on the development of socialist relations of production through collectivisation of the principal means of production, land and natural resources and through the exercise of democratic power by the working classes."

"Article 82. Intervention, Nationalisation and Socialisation.

• • •

2. The law may stipulate that expropriations of large landowners, big property owners and entrepreneurs or shareholders shall not be subject to any compensation whatsoever."

"Article 83. Nationalisation Measures Carried Out Since 26 April 1974.

1. All nationalisation measures carried out since 25 April 1974 are irreversible conquests by the working classes.

2. Small and medium-sized firms indirectly nationalised which are outside the basic sectors of the economy may exceptionally be made part of the private sector if the workers do not opt for self-management or a co-operative system."

"Article 84. Co-Operatives.

1. The state shall promote the establishment of co-operatives, notably production, marketing and consumer co-operatives, and their activities.

2. Without prejudice to their inclusion in the National Plan, and provided co-operative principles are observed, there shall be no restrictions on the constitution of co-operatives, which shall be free to join together in unions, federations and confederations.

3. The constitution and operation of co-operatives shall not be subject to any authorisation.

4. Fiscal and financial concessions to co-operatives and more favourable conditions for borrowing and for obtaining technical assistance shall be determined by law."

"Article 86. Economic Activity and Foreign Investment.

Economic activity and investment by foreign natural or artificial persons shall be regulated by law, to ensure that they contribute to the country's development in accordance with the National Plan and to safeguard national independence and the interests of the workers."

"Article 91. Objectives of the Plan.

1. With a view to the building of a socialist economy through the transformation of capitalist relations of production and accumulation, the economic and social organisation of the country shall be directed, co-ordinated and regulated by the National Plan.

2. The Plan shall ensure the harmonious development of sectors and regions, the efficient use of productive forces, the fair distribution of the national product among individuals and regions, the coordination of economic policy with social, educational and cultural policy, the preservation of the eccological balance, the protection of the enivronment and the quality of life of the Portuguese people."

It was the legal conclusion of Professor Manuel Rosa that the Constitution of Portugal grants a preferred legal status to the interests of the "working class"; that whenever the interests of the working class, or a cooperative such as respondents the management of which is controlled by or identified with the working class is involved, "it will prove to be very difficult for the Portuguese courts to be able to render impartial decisions . . .". Professor Manuel Rosa's conclusion is based upon the fact that the Constitution of Portugal gives an unconditional predominance to one specific class in Portuguese society—the working class.

Further, disruptions have occurred in The University of Lisbon, School of Law, which is one of the only two law schools in the entire nation. All members of the faculty of that law school left their position subsequent to the Portuguese revolution of April 25, 1974. Present faculty positions at the law school are filled by persons on the basis of their ideological or party affiliations, without regard to whether or not they are properly qualified for the position.

The long-range consequences on Portuguese jurisprudence are obvious.

The constitutional question herein was expressly raised in the Appellate Division of the Supreme Court of the State of New York, on appeal from the order of the Court of first instance (Appendix A, pp. 6a-9a). It was raised in petitioner's brief on the appeal to the Appellate Division as one of the three points offered therein in support of reversal, and it was reiterated in the reply brief.

The constitutional question was implicitly raised at Special Term of the Supreme Court of the State of New York, the court of first instance, through the assertion of petitioner in opposition to respondents' motion that he (petitioner) could not obtain a fair trial in Portugal. This assertion was set forth in three answering affidavits, viz, the affidavits sworn to April 6, May 4 and May 12 (Appendix C, pp. 25a-49a), as well as in the statement of a former member of the faculty of the University of Lisbon School of Law, attached to the affidavit of petitioner sworn to May 12, 1976 (Appendix C, pp. 36a-49a), and a Telex from the United States Department of State attached to that same affidavit (Appendix C, p. 50a). The opinion of Special Term of the New York State Supreme Court stated (Appendix A, p. 4a):

> ". . . Lastly, plaintiff has failed to persuade the court that he will not receive a fair trial in Portugal . . ."

While the majority opinion in the Appellate Division simply affirms the determination of the court of first instance and makes no explicit reference to the issue of constitutionality squarely raised on this appeal, its affirmance of the order of dismissal of the court of first instance applying CPLR § 327 in this action necessarily involves a decision upholding the constitutionality of that statute and

its application here. Moreover, the dissenting opinion of two Justices of that court contain the following statement respecting the ability of the courts of Portugal to afford petitioner a fair trial:

> ". . . However, I would add that the issue is a close one which viewed against the recent social history of the country of Portugal . . ."

The constitutional question was reiterated by petitioner in the Court of Appeals of the State of New York in his opposition to the respondents' motion to dismiss petitioner's appeal of right, and in support of his argument that a substantial constitutional question was directly involved. The Court of Appeals dismissed the appeal of right, to the extent that it was founded on the existence of a constitutional question, solely on the basis that, in its opinion, the constitutional question raised was not substantial; the rejection was not based on any impropriety or the manner in which the constitutional issue was presented. It stated:

> "Furthermore, the constitutional question articulated by appellant is not subsantial. There is no constitutional impediment to the application of the doctrine of forum non conveniens to a New York resident. . . ."

The Reason for Granting the Writ

The Courts of the State of New York have, in this action, decided the question of the validity, under the United States Constitution, of Rule 327 of the New York Civil Practice Law and Rules—a federal question of substance not heretofore determined by any Federal Court, including this Court. In addition, it is urged that the determination of the Courts of the State of New York on this issue are not in accord with the applicable decisions of this Court, as herein set forth.

Except for the determination in this action, the Courts of the State of New York have not heretofore passed upon the constitutional validity of Rule 327 of the Civil Practice Law and Rules, a relatively new statute effective September 1, 1972. The statute is particularly novel, especially with respect to the development of the law in the State of New York in this area, in that it expressly provides in its last sentence for the applicability of the doctrine of inconvenient forum notwithstanding the *domicile* or *residence* in New York of a party to the action.

Prior to the adoption of this statute, and the rendering by the Court of Appeals of its decision in *Silver* v. *Great American Insurance Co.*, 29 N.Y. 2d 356, 328 N.Y.S 2d 398, 278 N.E. 2d 619 (1972), which decision is codified by the aforementioned last sentence of the statute, the law in the State of New York had consistently rejected the application of the doctrine in a case involving a party resident of the State. In fact, only one case considered the question of the constitutionality of the doctrine of forum non-conveniens, viz, *Gregonis* v. *Philadelphia & Reading C & I Co.*, 235 N.Y. 152, 139 N.E. 223 (1923). In that case, the Court, by way of dicta, implied that the application of the doctrine to a case involving a resident plaintiff might well run afoul of the due process clauses of the State and Federal Constitutions. Neither *Silver* nor any other determination of the Courts of the State of New York have passed upon the constitutional validity of CPLR Rule 327.

More fundamentally, neither this Court nor any lower Federal Court has passed upon the question of the United States constitutional validity of the application of the doctrine of forum non-conveniens under the law of any jurisdiction in the United States where the application involves the dismissal of the action of a plaintiff resident of the jurisdiction requiring that he seek redress in the courts of a foreign nation. This question remains completely

undecided. Its significance to the administration of justice in the United States and as a new and fundamental procedual consideration is clear. As applied in this case, a plaintiff resident has been denied access to the courts of his home state where jurisdiction, at least quasi in rem, clearly exists, and has been relegated to the courts of a foreign nation where there exists at least a serious question as to the ability of those courts to provide this plaintiff a fair trial.

By virtue of the decision by the State courts in this case, any American businessman doing business with a foreign entity, even if the conduct of that business is within the United States, must face the prospect of litigating any dispute arising out of the operation of that business in the courts of the foreign nation. The burden imposed thereby on United States residents doing business on an international basis is therefore manifest. The United States resident must consider an entirely separate set of precepts apart from those integral to the issue of jurisdiction in first determining whether he will have access to the courts of his own state. He must consider the effect of the substantive laws of the foreign jurisdiction upon his activities and whether that jurisdiction will apply any recognizable rules of conflicts of laws in determining which laws are applicable. In addition, he

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[It is important to note that the affirmance by the Appellate Division of the order of Special Term of the Supreme Court, the court of first instance, is not based upon the determination of the lower court that personal jurisdiction was lacking but only ". . . on the ground of *forum* non-conveniens. . . ." (Exhibit C). The order of the Appellate Division, the Court to which the writ is directed, did not, therefore, pass upon the question of lack of personal jurisdiction. In all events, all courts agree that quasi-in rem jurisdiction validly existed through the attachment.]

must consider the extent to which the foreign jurisdiction will apply basic principles of due process as known in this country.

Further, and perhaps of utmost significance, is that the determination in this action is made without any clear guidelines as to what principles are of significance in weighing the ability of the juridical system of the foreign nation to afford a fair trial to the American resident or whether the ability of that jurisdiction to afford a fair trial and due process is at all a consideration in exporting the litigation to that jurisdiction. Even in terms of court administration, the significant question is posed as to the extent to which the courts in this nation must go to determine meaningfully whether the proposed tribunals of a foreign nation afford the basic procedural safeguards of due process and fundamental fairness.

Thus, it is urged that the scope of the issue raised by this petition transcends mere local effect, and is of paramount importance respecting the administration of the courts in the United States and the considerations applicable to United States residents doing any international business.

Question No. 1.

The writ should be granted on the basis that Rule 327 of the Civil Practice Law and Rules of the State of New York is either unconstitutional on its face, or, as applied herein, in that it is repugnant to the provisions of Article 1, Section 14 of the United States Constitution. The bases for this assertion are as follows:

(a) The statute in question permits the Courts of the State of New York to deny to a plaintiff resident access to those Courts and to relegate him even to the tribunals of a foreign nation jurisdiction. Moreover, as applied here, the statute operates to transfer an action to another nation where integral to that action are issues involving the

operation and conduct of a business in the United States with substantial and overriding contacts in the United States and New York and not in Portugal.

(b) As applied here, the statute in question relegates the petitioner to the Courts of Portugal, where there is, at best, a serious question as to the ability of the juridical system of that nation to afford a fair trial and substantial justice based upon the plain language of its constitution which, among other things, negates the fundamental right to compensation for expropriated property. The transference of this action is made without attempt to insure the application of basic principles of due process in its resolution or to provide that security be given equal to what had been obtained by attachment in the Courts of initial instance. These subsidiary bases are treated hereinbelow.

(a) The denial to a citizen (i.e., resident) by a State of access to its Courts is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

The analysis of the right of a resident to access to the Courts of his State is developed definitively in *Boddie* as follows:

> "Is it to courts, or other quasi-juridical official bodies that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, recognized the centrality of the concept of due process in the operation of this system . . ."
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> • • •
>
> "Prior cases established, first, that the process requires, at a minimum, that absent a countervailing

> state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard . . ." 401 U.S. at pp. 375-377

The alternatives to the petitioner in the instant action are no more viable than in *Boddie,* where the tainted statute required the payment of fees and costs as a condition to access to the Courts of the State in a matrimonial action. Petitioner has no option but to seek redress of his rights in a Court of law. The alternative offered by the determination of the State Courts, viz., litigation in the tribunals of Portugal with the attendant burden of inaccessibility and expense, are, at least, as prohibitive as the payment of fees and costs in Boddie. There is in the instant action, in addition, the demonstrated Portuguese constitutional provisions inimical to due process as recognized in the State and Federal Courts of the United States. The closeness of the issue of the ability of the Portuguese tribunals to afford substantial justice, recognized at least by two of the dissenting Judges in the Appellate Division, it is urged, is reason enough, under the circumstances of this case, to render the doctrine of *Boddie* applicable and the statute in question, as applied, constitutionally repugnant.

That the scope of the *Boddie* doctrine transcends its narrow restriction to matrimonial actions and extends to the attempt of a resident plaintiff to enforce any legal right, is clearly recognized in the concurring opinion of Mr. Justice Brennan in *Boddie,* wherein he states:

> "As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense

than that of the defendant called upon to defend his interests in court.' Ante at 376-377. In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants 'an opportunity to be heard upon their claimed right to a dissolution of their marriages' without a sufficient countervailing justification. Ante, 380. *I see no constitutional distinction between appellant's attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief that he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends to all proceedings entertained by the courts.*" (Emphasis Ours) 401 U.S. at pp. 387-388.

Conceding, *arguendo,* the constitutionality of CPLR Rule 327 on its face, and even as applied to a plaintiff resident, the employment of that statute in this action, involving the operation of the businesses of respondents and petitioner in the United States, including the State of New York, and the overriding contacts with this State, is repugnant to Section 1 of Article 14 of the United States Constitution as not affording due process and equal protection to the petitioner. The fulcrum on which this issue of constitutionality turns is as follows:

> "In short, 'within the limits of practicability' . . . a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause". *Boddie* v. *Connecticut,* at 379, citing *Mullane* v. *Central Hanover Tr. Co.,* 339, U.S. 306 (1950).

Boddie, as noted above, further defines the right to a "meaningful opportunity to be heard" as requiring that

that right be afforded to residents in the absence of "a countervailing State interest of overriding significance".

Rule 327 of the Civil Practice Law and Rules, lacking as it does on its face, any delineation of the factual contacts necessary to make the statute operable must, to preserve its constitutionality, be read as embodying within it the principles enunciated in *Boddie.* Thus, constitutional due process requires an analysis of the applicable facts, with a view toward determining whether the *Boddie* precepts have been satisfied. Due process and equal protection require that the denial of access, and with even more reason, the transference of an action to the courts of a foreign nation, be justified by meaningful and countervailing interests of overriding significance, factually supported.

Applying the principles of *Boddie* to the case at bar, these requirements can be satisfied only if the applicable facts demonstrate substantial contacts with Portugal justifying the transfer as a matter of due process. The situation is analogous to the minimum contact requirements necessary to justify jurisdiction as a matter of due process. Cf. *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945).

It is well established that:

> "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *McKnett* v. *St. Louis & San Francisco Railway Co.,* 292 U.S. 230, 233 (1934).

The record, virtually undisputed, is that the overriding contacts are in the State of New York and the United States, and not in Portugal. Petitioner had the authority

to bind respondents to contract-orders and conducted their entire business respecting the sale of their food products in the United States. The suit essentially and completely involves a definition of the business relationship between petitioner and respondents. Throughout the fourteen years of their relationship, petitioner's only place of business has been located in the City and State of New York, where officers of respondents travel frequently (69, 80, 83, 147, 150-154, 157-163).

Since this action, involving as it does residents of Portugal and a resident of the State of New York. Some inconvenience resulting from the situs of the litigation is inherent in it. The issue is whether the burden of this inconvenience should be placed on petitioner or respondents. Respondents do an international business—90 percent of their income being derived from international sales, that is, outside of Portugal. They are not strangers to the resolution in other countries of disputes arising from the operation of their business. The importance, in determining an issue of inconvenient forum, of the jurisdiction wherein a defendant derives his income in a suit involving the operation of his business has been recognized in the United States Courts. *Thomson* v. *Palmieri,* 355 F. 2d 64 (2d Cir. 1966). The respondents now seek to avoid litigation in the jurisdiction which provided them with substantial business where the litigation arises out of that business.

Even assuming, *arguendo,* some contacts in Portugal (though never established in this action), the law has been clearly settled in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1944) that:

> "unless the balance is strongly in favor of defendant, plaintiff's choice of forum should rarely be disturbed". [at p. 508]

This principle is all the more applicable where dismissal for inconvenient forum relegates plaintiff to the courts of a foreign nation. *Burt* v. *Isthmus Development Co.,* 218 F. 2d 353 (5th Cir. 1955); cert. den. 349 U.S. 922 (1955); *Founding Church of Scientology, etc.* v. *Verlag,* 536 F. 2d 429 (D.C. Cir. 1976). In *Burt,* the Court stated:

> "It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong." [at p. 357]

The existence of a serious constitutional question respecting the applicability of the doctrine of forum non-conveniens so as to relegate a resident of the United States to the courts of a foreign nation was long ago explicitly recognized by this Court in *Swift & Co.* v. *Compania Caribe,* 339 U.S. 684, 697 (1950).

Clearly, a dismissal here because petitioner is not a United States citizen would be violative of the Equal Protection Clause of the Fourteenth Amendment. *Takahashi* v. *Fish & Game Commissioner,* 334 U. S. 410 (1948).

(b) A fundamental principle, both under federal and New York law, which is said to be the same in this regard, concerning the applicability of the doctrine of inconvenient forum, is that there be a second forum available wherein a fair trial can be had. *Gulf Oil Corp.* v. *Gilbert* (supra), *Founding Church etc.* v. *Verlag* (supra), *Varkonyi* v. *S. A. Empresa,* 22 N.Y. 2d 333, 292 N.Y.S. 2d 670 (1968). Whether that principle is enunciated, as in *Gulf Oil,* that "The Court will weigh relative advantages and obstacles to fair trial" (at p. 508), or, as in *Varkonyi,* that it will consider ". . . such matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress . . ." (at p. 338), the pivotal consideration is the same.

It has often been determined under the federal forum non-conveniens statute (28 U.S.C. 1404), that a plaintiff will not be relegated to a forum where he cannot be assured of obtaining a fair trial. *Wookey* v. *Waterman S. S. Corporation,* 89 F. Supp. 909, 910 (S.D.N.Y. 1950); *Brown* v. *Woodring,* 174 F. Supp. 640, 645 (M.D. Penn. 1959); *Spound* v. *Action Industries, Inc.,* 369 F. Supp. 1066, 1068 (N.D. Ill. 1974).

As noted above, the dissent of two judges in the Appellate Division of the New York State Supreme Court acknowledges the closeness of the issue of the ability of the courts of Portugal to afford to petitioner a fair trial. The provisions of the Portuguese Constitution providing for expropriation of property without compensation, further socialization of the means of production by a single class, the singularization of classes for the promotion of welfare and granting of benefits, the establishment by the state of cooperatives as a vehicle for the transition to a socialistic state, the protection of the cooperatives and the establishment of a preferred legal status for these cooperatives, as part of a thoroughgoing national plan to transform a capitalistic system to a socialistic system have already been set forth above. In the light of this fundamental law of Portugal, and the ousting of private owners and officers and directors of the respondents by the Portuguese Government, as well as the attitude in governmental circles toward petitioner and his close affiliation with these former owners and directors (87-90), the prospect of the absence of a fair hearing in Portugal and the denial of due process is real and substantial.

Clearly, in the analogous situation involving recognition by the courts of the United States, as well as those of the State of New York, of judgments of foreign nations under principles of comity, the application of these principles and recognition of foreign judgments is always circumscribed by the requirement that the tribunal

rendering the judgment afforded an impartial hearing under principles of due process as recognized in this nation. *Hilton* v. *Guyot,* 159 U.S. 113 (1895); § 5304 (a)1, *Civil Practice Law and Rules of the State of New York.* The Hilton case applies this principle with even greater reason, where the party against whom the judgment is obtained is a United States national.

This Court has repeatedly held that expropriation without compensation is offensive to the public policy of the United States. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 436 (1964). In *United Bank Ltd.* v. *Cosmic International, Inc.,* 392 F. Supp. 262, 266 (S.D., N.Y. 1975), the Court stated:

> "There is no question that such an expropriation is offensive to the public policy of this country and its constituent States. *Banco Nacional,* supra, at 436, 84 S. Ct. at 944. New York Courts are in accord on this point; see *Perutz* v. *Bohemian Discount Bank in Liquidation,* 304 N.Y. 533, 110 N.E. 2d 6 (1953); *Vladikavkazsky Ry Co.* v. *New York Trust Co.,* 263 N.Y. 369, 189 N.E. 456 (1934); *Gonzales* v. *Industrial Bank (of Cuba),* 12 N.Y. 2d 33, 234N.Y.S. 2d 210, 186 N.E. 2d 410 (1962)."

Petitioner validly attached some $185,000.00 of property of respondent Unisul in this action, to secure any judgment that petitioner might obtain. The validity of that attachment has never been questioned by respondents. It affords a clear-cut basis for quasi in rem jurisdiction. Only the determination of the Courts below that the doctrine of inconvenient forum is applicable has worked to upset the attachment. Notwithstanding petitioner's request below that the attachment be continued to secure any judgment that petitioner might obtain, whatever the ultimate jurisdiction, the Courts have refused such request and the order of dismissal contains only a provision that respondents accept service of process in Portugal. This

further highlights the problem of due process in Portugal and of the efficacy of any judgment which petitioner might even obtain in that jurisdiction. The application by the Courts below of the doctrine of inconvenient forum has resulted not only in the relegation of petitioner to the courts of a foreign nation, but the nullification of the long established procedural remedy of attachment validly obtained by petitioner and its efficacy as security for any judgment that petitioner might obtain.

The Courts of the United States have consistently refused to apply the doctrine of inconvenient forum to transfer an action to the courts of a foreign nation where the result would be the nullification of the security of an existing attachment by plaintiff, with no equivalent security supplied by defendant in replacement (7). *Swift & Co.* v. *Compania Caribe,* supra; *Wall Street Traders, Inc.* v. *Sociedad Espanola, etc.,* 245 F. Supp. 344 (D.C. 1964).

CONCLUSION

Civil Practice Law and Rules, Rule 327, is violative of Section 1 of the Fourteenth Amendment to the United States Constitution. In the alternative, that statute, as applied in this action, is repugnant to that constitutional provision.

Respectfully submitted,

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APPENDIX A.

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

Index No. 20058/75

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Plaintiff,

—against—

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVE TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; and COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,
Defendants.

TIERNEY, J.:

This is a motion pursuant to CPLR 327 and 3211(a)(8) to dismiss this action in which jurisdiction has been obtained under an order of attachment dated November 17, 1975, in the sum of $300,000.00.

The moving parties are Portuguese agricultural cooperatives and their marketing agent (UNISUL). Plaintiff, a Portuguese citizen and a longtime resident of New York, had been defendants' exclusive sales agent for many years prior to September, 1975. His action, in which he seeks damages totalling $1,700,000, is premised primarily on the breach by defendants of a claimed joint venture agreement (the agreement) entered into July 9, 1971. Al-

legedly, defendants breached their fiduciary duty to plaintiff arising out of the agreement, as well as out of the parties' long-standing exclusive agency arrangment. Defeandants contend the agreement did not establish a joint venture between themselves and plaintiff, but merely extended his then expiring exclusive distributorship.

It is undisputed that the agreement was executed in Portugal. Further, there is no indication from the papers submitted that defendants engaged in any purposeful activity in New York to promote the sale of defendants products in United States upon which sales they derive approximately one-third of their total revenues. The independent acts in New York by a resident in a contractual relationship with a non-resident may not be attributed to the non-resident so as to constitute the transaction of business here within the meaning of the "long-arm" statute. (Haar v. Armendaris Corp., 31 N Y 2d 1040) Further, there is no sufficient showing of the commission by defendant of any tortious act outside New York causing injury within the State within the purview of CPLR 302 3(i) and (ii). (See Kramer v. Vogl, 17 N Y 2d 27, 31.) The tortious acts alleged in the complaint are premised on defendants claimed participation in a conspiracy whereby they "are usurping and arrogating to themselves the business of the plaintiff" by refusing since September, 1975, to fill orders for the purchase of food products submitted by plaintiff and by "continuing to use plaintiff's confidential information and trade secrets" in connection with their sales here since then. This tort cause of action alleges, in essence, that defendants engaged in a conspiracy to breach their contract with plaintiff, and such does not constitute a valid cause of action (Bereswill v. Yablon, 6 N Y 2d 301).

However, plaintiff's contention that defendants are subject to this court's jurisdiction under CPLR 301 is untenable. The acts of plaintiff in New York were not those of defendants, since it is clear that defendants exercised no control over plaintiff's activities in furtherance of his status as defendants' sales agent (Del Bello v. Japanese Steak House, Inc., 43 A D 2d 455, 457; cf. Frummer v. Hilton Hotels Int., 19 N Y 2d 533).

Accordingly, that branch of the motion pursuant to CPLR 3211(a)(8) is granted for the reason that plaintiff has not obtained personal jurisdiction over defendants under the "long-arm" statute. Nevertheless, with respect to the jurisdictional issue alone, plaintiff would be entitled to prosecute his action here to the extent of the value of any property that has been levied upon pursuant to the aforementioned order of attachment. However, the branch of defendants' motion, predicated on the ground of forum non conveniens, remains to be treated.

As to that branch of the motion seeking forum non conveniens relief, it is the court's opinion that "on balancing the interests and convenience of the parties and the courts (this) action could better be adjudicated in" Portugal, since "it plainly appears that New York is an inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties" (Silver v. Great American Ins. Co., 29 N Y 2d 326, 360, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portuguese national and makes frequent business trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugual and plaintiff's affidavits furnish little factual sup-

Appendix A.

port for the conclusory language of the complaint ascribing tortious conduct here by defendants.

Lastly, plaintiff has failed to persuade the court that he will not receive a fair trial in Portugal.

Accordingly, that branch of the motion brought pursuant to CPLR 327 is granted, upon condition that defendants serve notice upon plaintiff, within 20 days after service of a copy of the order to be settled hereon, with notice of entry, that they will each accept service of process in Portugal and appear in any action commenced there by plaintiff for the same relief demanded in the complaint herein, and that in any action so commenced they will not plead (and will thereby waive) the statute of limitations as a defense.

Settle order.

Dated: June 16th, 1976.

CGT

J. S. C.

FILED
AUG 4 1976
NEW YORK
CO. CLERK'S OFFICE

Appendix A.

13 JOSEPH CHRISTOVAO, Appellant, v UNISUL-UNIAO DE COOP. TRANS. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al., Respondents, and ATTORNEY-GENERAL OF THE STATE OF NEW YORK, Intervenor.—Order, Supreme Court, New York County, entered on August 4, 1976, affirmed, on the ground of *forum non conveniens* for the reasons stated by Tierney, J., at Special Term. Respondents shall recover of appellant $60 costs and disbursements of this appeal. Concur—Kupferman, J. P., Silverman and Lane, JJ.; Lupiano and Birns, JJ., dissent in the following memorandum by Lupiano, J.: While I concur that dismissal of the complaint would be appropriate on the ground of *forum non conveniens* (CPLR 327) assuming jurisdiction had been properly obtained, examination of the record mandates the conclusion that the jurisdictional objections of the defendants were waived and that dismissal of the complaint pursuant to CPLR 3211 (subd [a], par 8) as directed by Special Term was in error, rendering consideration of the applicability of the doctrine of *forum non conveniens* relevant. To predicate dismissal of the complaint solely on the ground of *forum non conveniens* without consideration of the jurisdictional basis for application of that doctrine is improper. "Until 1972 when CPLR 327 was added to the Civil Practice Laws and Rules, the doctrine of *forum non conveniens* had not been codified in New York. The doctrine had been developed through case law to justify the stay or dismissal of actions where it is determined, upon balancing interests and conveniences of the parties and the court, that the action would be better adjudicated in another forum. It is not a jurisdictional doctrine; *its applicability presupposes that the parties are subject to the jurisdiction of the court*" (1 Weinstein-Korn-Miller, NY Civ Prac, par 327.01). (Emphasis supplied.)[1] *Forum non con-*

[1] "Early Scottish cases dealing with a plea of *'forum non*

(footnote continued on following page)

veniens is an equitable doctrine and requires a showing based upon the balancing of interests that the action is better adjudicated in another forum. "The doctrine • • • was first developed • • • as a means of dismissing an action *where jurisdiction was proper,* but where the ends of justice would be best served if it were litigated in a more convenient forum. The convenience here referred to was generally not the court's convenience, but that of the parties" (Note, Effect of the Common-Law Doctrine of Forum Non Conveniens on the New York Statute

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(footnote continued from preceding page)

competens' suggest that the question litigated was one of power or jurisdiction rather than discretion; but as early as 1845 it was recognized that the question was one 'on the merits' rather than one of jurisdiction, and the English words 'inconvenient forum' were used to point out the inaccuracy of the traditional Latin form" (Braucher, The Inconvenient Federal Forum, 60 Harv L Rev 908, 909). The classic American treatise on *forum non conveniens* defines the doctrine as dealing "with the discretionary power of a court to decline to exercise a *possessed jurisdiction* whenever it appears that the cause before it may be more appropriately tried elsewhere" (Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col L Rev 1 [1929]). It has been stated that "slowly and painfully, American courts are developing a common law of forum non conveniens as a corrective of the serious shortcomings in a law of personal jurisdiction based on mere personal service • • • Forum non conveniens, which now allows discretionary refusal to 'take' *existing jurisdiction,* may then assume the positive function of indentifying the *forum conveniens* in terms of substantial contacts such as the plaintiff's residence, the origin of the cause of action or the presence of property" (Ehrenzweig, The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens, 65 Yale LJ 289, 312; emphasis supplied). Indeed, as early as *Dewitt v Buchanan* (54 Barb 31) it was observed that although a court would have jurisdiction over suits between nonresidents as a matter of law, nevertheless as a matter of policy, jurisdiction should be exercised in exceptional cases. Thus, the issue relevant to the doctrine is whether jurisdiction should be exercised, not whether jurisdiction has been obtained, it being assumed or found that jurisdiction had obtained.

Granting Jurisdiction over Suits against Foreign Corporations, 26 Fordham L Rev 534, 537) (Emphasis supplied).[2] Parenthetically, it is noted that CPLR 327 specifically provides that the court may invoke the doctrine only on the motion of a party and does not provide the court's raising the plea of *forum non conveniens* on its own motion: The following factual summary will be helpful in resolving the issues: Plaintiff is a Portuguese national and a resident of New York engaged in the business of marketing and distributing food products. Defendants are Portuguese corporations, the directors and officers of which are Portuguese nationals residing in Portugal. Defendant Unisul-Uniao is the marketing agent for the other defendants. The record reveals that plaintiff was the exclusive sales agent for the defendants for many years prior to September, 1975. In this action he seeks $1,700,000 based essentially on the alleged breach by the defendants of a claimed joint venture agreement entered into on July 9, 1971 in Portugal. Also, plaintiff claims breach of a long-standing exclusive agency arrangement. Defendants contend that there is no joint venture between the parties and that the agreement alluded to by plaintiff merely extended his then expiring exclusive distributorship. Plaintiff claims jurisdiction based upon a levy of attachment which reached assets owned by Unisul-Uniao. Special Term concluded that the four agricultural corporate defendants which utilize defendant Unisul-Uniao as their marketing agent, each of which is alleged to have made separate oral contracts with the plaintiff, did not have any nexus with the United States or New York at

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[2] It is the fact that the court has jurisdiction which serves as the basis for its refusal to entertain that jurisdiction under the doctrine of *forum non conveniens* (see *Irrigation & Ind. Dev. Corp. v Indag, S. A.,* 44 AD2d 543, affd 37 NY2d 522; *Hernandez v Cali, Inc.,* 32 AD2d 192, 196, affd 27 NY2d 903).

least since 1970. Most of the activities relied on by the plaintiff as being of a purposeful business nature allegedly engaged in by defendants were, in fact, conducted at the instance of and through plaintiff himself, in fulfillment of his duties under the agency agreement. As aptly noted by Special Term: "The independent acts in New York by a resident in a contractual relationship with a non-resident may not be attributed to the non-resident so as to constitute the transaction of business here within the meaning of the 'long-arm' statute. (Haar v. Armendaris Corp., 31 NY2d 1040 [1973]). Further, there is no sufficient showing of the commission by defendant of any tortious act outside New York causing injury within the State within the purview of CPLR 302 3 (i) and (ii). (See Kramer v. Vogl, 17 NY2d 27, 31 [1966].) The tortious acts alleged in the complaint are premised on defendants claimed participation in a conspiracy whereby they 'are usurping and arrogating to themselves the business of the plaintiff' by refusing since September, 1975, to fill orders for the purchase of food products submitted by plaintiff and by 'continuing to use plaintiff's confidential information and trade secrets' in connection with their sales here since then. This tort cause of action alleges, in essence, that defendants engaged in a conspiracy to breach their contract with plaintiff, and such does not constitute a valid cause of action (Bereswill v. Yablon, 6 NY2d 301 [1959]). However, plaintiff's contention that defendants are subject to this court's jurisdiction under CPLR 301 is untenable. The acts of plaintiff in New York were not those of defendants, since it is clear that defendants exercised no control over plaintiff's activities in furtherance of his status as defendants' sales agent (Del Bello v. Japanese Steak House, Inc., 43 AD2d 455, 457 [4th Dept., 1974]; cf. Frummer v. Hilton Hotels Int., 19 NY2d 533 [1967])." Therefore,

under Special Term's reasoning, as to the corporate defendants other than defendant Unisul-Uniao, the failure to obtain personal jurisdiction under the "long-arm" statute mandated dismissal of the causes of action asserted against said defendants pursuant to CPLR 3211 (subd [a], par 8). However, as to defendant Unisul-Uniao, plaintiff prior to service of a summons and complaint obtained issuance of an order of attachment under which he levied on property in which this defendant has an interest. This attachment is sufficient as a predicate for jurisdiction quasi in rem with respect to plaintiff's claim for money damages against Unisul-Uniao. In this context, the invocation by said defendant of the doctrine of *forum non conveniens* is viable and such ground may serve as a predicate for Special Term's declination to exercise quasi in rem jurisdiction (see *Hadjioannou v Avramides,* 40 NY2d 929; *Donawitz v Danek,* 53 AD2d 679). Accordingly, assuming Special Term was correct in its conclusion that jurisdiction was not obtained over the defendants other than quasi in rem jurisdiction over Unisul-Uniao, the jurisdictional predicate for application of the equitable doctrine of *forum non conveniens* as to those defendants was not present. Nevertheless, we need not consider this anomalous aspect of the determination appealed from, because on this record it must be concluded that defendants have waived their jurisdictional objections. Defendants do not controvert plaintiff and his counsel's assertion that after this action was instituted, defendants removed this action to the United States District Court for the Southern District of New York and moved in that court for dismissal of this action on the grounds of failure to state a cause of action and for summary judgment; that plaintiff opposed and was successful in having this matter remanded to the State court where it was commenced because of lack of diversity

jurisdiction in the Federal court. This activity by defendants necessarily constitutes a submission to the jurisdiction of the State court and effected a waiver of their jurisdictional objections (*Farmer v National Life Assn. of Hartford,* 138 NY 265). Parenthetically, it is noted that the defendants in initiating their motion to dismiss the complaint by way of order to show cause dated February 19, 1976 and supported by an affidavit dated February 18, 1976, asserted only the claim of *forum non conveniens* and it was not until April 28, 1976, in a reply affidavit that they, for the first time, raised any objection to personal jurisdiction or sought any relief under CPLR 3211 (subd [2], pars 8, 9). With respect to the application of *forum non conveniens* I am in accord with the analysis of Special Term wherein it was observed that "it is the court's opinion that 'on balancing the interests and convenience of the parties and the courts [this] action could better be adjudicated in' Portugal, since 'it plainly appears that New York is an inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties' (Silver v. Great American Ins. Co., 29 NY2d 356, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portuguese national and makes frequent business trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugal and plaintiff's affidavits furnish little factual support for the conclusory language of the complaint ascribing tortious conduct here by defendants. Lastly, plaintiff has failed

to persuade the court that he will not receive a fair trial in Portugal." On this basis I conclude that it was proper to refuse to entertain the plaintiff's action. However, I would add that the issue is a close one when viewed against the recent social history of the country of Portugal. Accordingly, the order of the Supreme Court, New York County, entered August 4, 1976, dismissing the complaint on the ground of *forum non conveniens* upon defendants' consenting to accept service of process in Portugal and on the ground that the court has no jurisdiction of defendants, should be modified, on the law, to the extent of reversing that part which dismisses the complaint pursuant to CPLR 3211 (subd [a], par 8) and, as so modified, the order should be affirmed, without costs and disbursements.

JOSEPH CHRISTOVAO, Doing Business as Mercantum Trading COMPANY, Appellant, v UNISUL-UNIAO DE COOP. TRANSP. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al., Respondents, and ATTORNEY-GENERAL OF THE STATE OF New York, Intervenor.

Submitted January 17, 1977, decided February 22, 1977

Appeal—Court of Appeals—appeal as of right—dissent.

An appeal from an order of the Appellate Division which affirmed, by a divided court, an order of the Special Term dismissing the complaint on the grounds that personal jurisdiction over defendants was lacking and that, as to quasi--in-rem jurisdiction over their property, New York was not a convenient forum, should be dismissed. The dissent at the Appellate Division was not on a question of law in favor of plaintiff (CPLR 5601, subd [a], par [i]). The dissenting Justices stated that objections to personal jurisdiction had been waived and that the complaint should have been dismissed solely for *forum non conveniens.* Such slight modification was for technical reasons only. In actuality the minority

concurred in the result. The ultimate measure of a dissent is whether the minority would have determined the appeal substantially in favor of plaintiff.

Reported below, 55 AD2d —.

MOTION to dismiss an appeal, taken allegedly as of right, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 21, 1976, which, by a divided court, affirmed, on the ground of *forum non conveniens,* an order of the Supreme Court at Special Term (CHARLES G. TIERNEY, J.), entered in New York County, dismissing plaintiff's complaint.

Vito Vincenti, New York City, for appellant.

Charles L. Sylvester, New York City, for respondent.

Per Curiam. Motion to dismiss appeal granted and appeal dismissed. The dissent at the Appellate Division was not on a question of law in favor of the appellant within the meaning of CPLR 5601 (subd [a], par [i].) Plaintiff attempted to assert jurisdiction over the persons of the defendants and, through an attachment, over their property. Special Term ordered the complaint dismissed on the grounds that personal jurisdiction was lacking (CPLR 302; 3211, subd [a], par 8) and, as to the remaining quasi-in rem jurisdiction, that New York was not a convenient forum for the resolution of this dispute (CPLR 327). The Appellate Division affirmed the order, with two Justices dissenting. The dissent stated that objections to personal jurisdiction had been waived and that the complaint should have been dismissed solely for *forum non conveniens.* Therefore, the dissent advocated a slight modification of the order of Special Term to delete the portion of the order dismissing the complaint for want of personal jurisdiction.

It is apparent that the minority view was styled a dissent for technical reasons only. In actuality, the Appellate Division minority concurred in the result but on only one of two alternative grounds.

CPLR 5601 was amended in recent years (e.g., L 1969, ch 999; L 1971, ch 44; L 1973, ch 95) to confine appeals as of right to situations where disagreement in the courts below would indicate the existence of debatable issues of law that would be reviewable by the Court of Appeals. (See Memorandum of the Court of Appeals, 1969 NY Legis Ann 1, 2; see, also, 1973 NY Legis Ann 20.) While it is true that the dissent here expressed limited agreement with one argument of the appellant, the ultimate resolution advocated by the dissent, dismissal of the complaint for *forum non conveniens,* was scarcely in his favor. The history and purpose of this amendment to CPLR 5601 leads us to view the statutory dissent requirement in a practical, not literal, sense. The ultimate measure of the substance of a minority viewpoint is not whether it articulates some agreement with the appellant's position, but, instead, whether the minority would have determined the appeal substantially in his favor. Only when the minority has given appellant the benefit of its vote, as well as the benefit of its views, may it be said that there is actual disagreement sufficient to indicate the existence of a debatable law issue. Since, in this case, all of the Justices below advocated the dismissal of the complaint, it cannot be said that a technical dissent, substantively closer to a concurrence, should generate an appeal as of right.

Furthermore, the constitutional question articulated by appellant is not substantial. There is no constitutional impediment to the application of the doctrine of *forum non conveniens* to a New York resident.

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and $20 costs of motion.

APPENDIX B.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 20058/75

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Plaintiff,

—against—

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAI, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; and COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Defendants.

JUDGEMENT

Defendants having moved for an order to dismiss the Complaint on the ground of forum non conveniens and to dismiss the Complaint on the ground that the Court has not jurisdiction over the persons of the Defendants, and said motion having duly come on to be heard before Mr. Justice Tierney at a Special Term, Part I of this Court, held at the Courthouse, located at 60 Centre Street, New York, New York, on the 12th day of May, 1976, and Mr. Justice Tierney having granted said motion by order dated August 3, 1976, directing that the Complaint be dismissed to the extent (1) that this action is based upon personal jurisdiction and (2) that this action be dismissed (based upon the attachment in this action having conferred upon this Court quasi in rem jurisdiction over the

Defendant Unisul's property) on the ground of forum non conveniens, upon condition that the Defendants or their attorneys serve written notice upon Plaintiff, or his attorneys, in such form as shall be binding upon them in Portugal; that they will each accept service of process in Portugal and appear in any action commenced there by Plaintiff for the same relief demanded in the Complaint, in such manner as to confer personal jurisdiction to the Court of Portugal over the Defendants in that action, and that in any action so commenced, they will not plead and will thereby waive any applicable statute of limitations as a defense and said order dated August 3, 1976 having been entered and filed in the office of the Clerk of the County of New York on August 4, 1976, and said order having been affirmed by the Appellate Division of the Supreme Court, First Department, by order dated December 21, 1976, and said written notice as aforesaid having thereafter been duly served upon Plaintiff's attorneys and Plaintiff having appealed to the Court of Appeals as of right, and said appeal having been dismissed by the Court of Appeals on February 22, 1977, and the costs and disbursements of Defendants having been duly taxed in the sum of $415.64, against Plaintiff.

Now, on motion of Warshaw, Sylvester, Burstein & Franks, attorneys for Defendants, it is

ADJUDGED, that the Complaint be, and the same hereby is dismissed, and that Defendants, residing in Coruche, Portugal, recover against plaintiff, residing at 225 Broadway, New York, New York, the costs and disbursements as taxed in the sum of $415.64, and that Defendants have execution therefor.

Judgment signed this 24th day of February, 1977.

s/ NORMAN GOODMAN, Clerk

Filed
Feb 24 1977
NEW YORK
Co. CLERK'S OFFICE

Appendix B.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in the County of New York, at the County Courthouse thereof, on the 3rd day of August, 1976.

Index No. 20058/75

PRESENT:

CHARLES G. TIERNEY, JUSTICE

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY

Plaintiff

against

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al.

Defendants

ORDER

The defendants having moved for an order pursuant to CPLR, § 327 to dismiss the complaint on the ground of forum non coveniens and pursuant to CPLR, Rule 3211 (a)(8) to dismiss the complaint on the ground that the Court has not jurisdiction over the persons of the defendants, and the motion having duly come to be heard before me on the 5th day of May, 1976, and I having granted an extension of time to serve and submit all papers to May 12, 1976,

Now, upon reading and filing the order to show cause dated February 19, 1976 per Justice Edward J. Greenfield, the affidavit of Charles L. Sylvester sworn to Feb-

Appendix B.

ruary 18, 1976, the exhibit attached thereto; the affidavit of Charles L. Sylvester sworn to April 28, 1976, the affirmation of Jerome Teich, Esq., dated April 27, 1976 and the three exhibits attached thereto, the affidavit of Charles L. Sylvester sworn to May 4, 1976 and the four exhibits attached thereto, the affirmation of Martin R. Lee, Esq. dated May 4, 1976, all submitted in support of the motion; and the affidavit of Joseph Christovao sworn to April 6, 1976, and the three exhibits attached thereto, the affidavit of Joseph Christovao sworn to May 4, 1976, the affirmation of Vito Vincenti, Esq. dated May 4, 1976 and the six exhibits attached thereto, the affidavit of Joseph Christovao sworn to May 12, 1976 and the three exhibits attached thereto, submitted in opposition to the motion and upon all the pleadings and proceedings heretofore had herein, and the defendants having appeared by Warshaw, Sylvester, Burstein & Franks, Esqs. in support of the motion, and plaintiff having appeared by Vincenti & Schickler, Esqs., in opposition thereto, and after due deliberation having been had thereon, and upon the filing of the written decision of this Court, it is upon motion of Warshaw, Sylvester, Burstein & Franks, Esqs., attorneys for defendants,

ORDERED, that that branch of the defendants' motion pursuant to CPLR, Rule 3211 (a)(8) to the extent that this action is based upon personal jurisdiction be, and the same is hereby granted, and it is further

ORDERED that that branch of the defendants' motion predicated on the ground of form non conveniens pursuant to CPLR, § 327, to the extent that this action is based upon the attachment in this action having conferred to this Court quasi in rem jurisdiction over the defendants' property attached to date, be and the same is hereby granted upon condition that the defendants or their attorneys serve

Appendix B.

written notice upon plaintiff, or his attorney in such form as shall be binding upon them in Portugal, within twenty (20) days after service of a copy of the within order with notice of entry, that they will each accept service of process in Portugal and appear in any action commenced there by plaintiff for the same relief demanded in the complaint herein, in such manner as to confer personal jurisdiction to the Court in Portugal over the defendants in that action, and that in any action so commenced, they will not plead and will thereby waive any applicable statute of limitations as a defense; and it is further

ORDERED, that the complaint in this action be and the same is hereby dismissed upon defendants' compliance with the provisions of the immediately preceding decretal paragraph providing, however, that the dismissal of this action shall in all events be stayed for a period of 7 (seven) days following service of a copy of this order with notice of entry upon the attorneys for the plaintiff, and it is further

ORDERED, that the Clerk of this Court be and he is hereby directed to enter judgment accordingly.

ENTER

CGT
J.S.C.

FILED
August 4, 1976
N. Y. County Clerk's Office

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1976.

Present—Hon. Theodore R. Kupferman,
Justice Presiding,
Vincent A. Lupiano
Harold Birns
Samuel J. Silverman
Myles J. Lane, Justices.

3661

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Plaintiff-Appellant,

—against—

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTORS AGRICOLAS DO VALE DO SORRAI, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L. and COOPERATIVE AGRICOLA DO MIRA, S.C.R.L.,
Defendants-Respondents

—and—

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Intervenor.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court,

Appendix B.

New York County (Tierney, J.) entered on August 4, 1976, dismissing plaintiff's complaint,

And said appeal having been argued by Mr. Vito Vincenti, of counsel for the appellant, by Mr. Charles L. Sylvester, of counsel for the respondents, and Mr. Joel Lewittes, of counsel for the intervenor,

And due deliberation having been had thereon,

It is ordered that the order so appealed from be and the same is hereby affirmed, on the ground of forum non conveniens for the reasons stated by Tierney, J., at Special Term. Respondents shall recover of appellant $60 costs and disbursements of this appeal. [Lupiano and Birns, JJ dissent in a memorandum by Lupiano, J.]

ENTER:

JOSEPH J. LUCCHI

Appendix B.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of February A. D. 1977.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Appellant,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al.,
Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Intervenor.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion. Opinion Per Curiam.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 12, 1977.

Present—Hon. Theodore R. Kupferman,
Justice Presiding,
Vincent A. Lupiano
Harold Birns
Samuel J. Silverman
Myles J. Lane, Justices.

M-699

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Plaintiff-Appellant,

—against—

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAI, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE SADO, S.C.R.L.: COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L. and COOPERATIVE AGRICOLA DO MIRA, S.C.R.L.,

Defendants-Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

The above named plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of

Appendix B.

this Court entered on December 21, 1976,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statements of Vito Vincenti and the memorandum of Messrs. Vincenti & Schickler, in support of said motion, and the statement of Charles L. Sylvester in opposition thereto, and after hearing Mr. Vito Vincenti for the motion, and Mr. Charles L. Sylvester opposed,

It is ordered that said motion be and the same is hereby denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of July A. D. 1977

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

1 Mo. No. 464

JOSEPH CHRISTOVAO, d.b.a. MERCANTUM TRADING COMPANY,

Appellant,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al.,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX C.

Affidavit of Joseph Christovao in Opposition to Motion, Sworn to April 6, 1976.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 20058/75

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Plaintiff,

—against—

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAI, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L. and COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH CHRISTAVO being duly sworn, deposes and says:

• • • • •

It is respectfully submitted that the instant application of the defendants to dismiss this action is totally devoid of merit and would, if granted, compel me to seek redress of my rights herein in Portugal, a jurisdiction where, at present, political freedom and rule of law are non-existent, and where I, as a United States resident of many years, would have no chance of obtaining justice.

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[10] Further, and apart from all other considerations, not only is Portugal an inconvenient jurisdiction and its Courts an inconvenient forum for the conduct of this litigation, but there exists in that nation, at present, a total lack of the basic political freedoms and the fundamental rule of law on which any person, and especially I, as a United States resident, could rely for substantial justice. This is not only a situation of which I am intimately aware but, moreover, I will demonstrate that the present General Manager of the defendant UNISUL is in complete agreement with respect to this.

• • • • •

I respectfully submit that the question of another convenient forum in Portugal is ultimately resolved by the political, social and economic situation existing in Portugal today and which has existed since 1974. Virtually, all business in Portugal, especially that dealing with exports must be dealt with on a sub rosa basis. The defendants, themselves, acknowledge this or at least used this as a ruse when they cancelled my written agency agreement, but advised me that they were doing so because the Portuguese government would not permit a renewal of a long-term agreement appointing me as defendants' representative, and that they would continue our agreement to sell in the United States exclusively through me for as long as they continued to sell their products in the United States, and that this situation would continue until they were able to make a new written agreement with me. Knowing the Portuguese situation intimately, this jibed with the facts and I believed the defendants. My anti-Communist sentiments are well known in Portugal, including within Portuguese government circles and I have expressed them openly to officers and directors of the defendants. Many of the former officers and directors of the defendants have been removed from their offices by

Appendix C.

the Portuguese government. The agricultural cooperatives in Portugal, including the defendants, are closely scrutinized by the Portuguese government and, in fact, the private owners and their representatives have largely been ousted from their positions. The practical effects and activities of the Courts and laws are devoid of any respect for contractual relationships and the attitude of the government and the Courts is subjective and geared to deprive entrepreneurs and especially residents of non-Communist countries, of whatever property rights, as we know them here, these persons may have. I can state, unequivocally that, at present, there is no law in Portugal as we know it, i.e., a rational system of rules which offer some predictability as to the determination of disputes.

This is conclusively borne out by the letter of Jose M. Potier, the general manager and chief operating officer of the defendant, UNISUL, and the individual acting in behalf of defendants, who has thus far participated, by way of affidavits and otherwise, most actively in this lawsuit in behalf of defendants. The letter is dated March 25, 1975 and was sent by Potier to me from Zurich, Switzerland. In it, he states:

> "Can you imagine the situation at which we have arrived that in order for me to write to you in complete freedom, I have to do it from Switzerland where I am at on business . . .
>
> "You know that nothing connected me politically with the old regime and you also know that I was one of those that was happy with the event of April 25th because I always expected that this would contribute to the greater freedom of our people and especially for better living conditions in all aspects for our countrymen, particularly those that always lived with great difficulty, i.e., the most underprivileged classes . . .

Appendix C.

"Finally today, eleven months past the far away April 25th, what do we have in Portugal, a terrible social atmosphere, everyone looking distrustful and afraid, with people afraid of speaking freely in the street, on the telephone, in the jobs, even at home, with actual prosecutions of all those that disagreed and say what they think in order not to be considered reactionary and without any notice expelled from their jobs and thrown into unemployment . . .

"With regard to the professional aspect, there too, things are not going in a way to encourage me. As you know, after the day March 11th, Dr. Calapez Garcia and Matos Bras were jailed. On the 13th, the workers of the cooperative [SORRAIA] after a terrible plenary meeting in the worse possible atmosphere, in the presence of an army officer, expelled all the directors, i.e., Dr. Castello Branco, Eng. Joao Falcao, Dr. Jose Manuel Andrada, Antonio Paim e Antonio Alberto, and delegate director engineer Francisco Lino, and manufacturing engineer, Pais de Carvalho, and the agricultural technician of the rice plant, Raul Godinho who is a cousin of Mr. Afonso Patricio, Mr. Juvensal Castelo, who is the father of Manuel Santos, and who was in charge of timekeeping of personnel attendance and absences, and also Joaquim Grilo, who was in charge of transportation. In addition, there were others that had votes against them, like for example, Victor Dias, and inasmuch as there are still people saying that we will have more expulsions, you can imagine the atmosphere in which we live in the office . . .

"I don't know what will become of our lives and I see the future in very dark colors because there is no guarantee in any form, or any hope that the next election will contribute toward the betterment of our atmosphere in which we live in our country. I question myself regarding everything and I don't see any solution for so many and such grave problems that we face in this moment which is without doubt very grave. I am completely desolute and very preoccupied with the future of my family and, especially, with that of my children and the worst part of it is that I don't see where to go . . .

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"Returning to the cooperative, an administrative committee of three members, including Canada was now nominated which will direct matters until elections are held for the choice of the new management. We hope that things will run without major change . . . By temperament, I don't feel jealous of anyone. The truth is that each one knows himself and God knows everyone, but the fact is that although knowing that you have serious problems, I am jealous of the fact that you can live in a country like that far away and free of the terrible hell where we are, without hope of betterment in the immediate future . . ."

The event of April 25, 1974 referred to in Potier's letter is the date that the Communist clique gained substantial control of the Portuguese government. On March 11, 1975, the Communists took complete control of the Portuguese government and, on that date, the jailings and expulsions referred to in Potier's letter took place. Dr. Galapez Garcia was, prior to his jailing on March 11, 1975, a director of the defendant, COOPERATIVA AGRICOLA DO MIRA, S.C.R.L. [MIRA] and Matos Bras was general manager of the defendant, COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L. [ROXO].

• • •

Wherefore, it is respectfully prayed that the within application be in all respects denied.

JOSEPH CHRISTOVEO

(Sworn to by Joseph Christoveo, April 6, 1976.)

Appendix C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Plaintiff,

—against—

UNISUL-UNIAO DE COOP. TRANSF, DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; and COOPERATIVA GRICOLA DO MIRA, S.C.R.L.;

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOSEPH CHRISTOVAO being duly sworn, deposes and says:

With respect to Portugal offering me an opportunity for a fair hearing of the issues in this action, defendants offer the fact of an election to contravene the effects of a situation which has existed in Portugal since approximately April 1974 and which has involved, and still involves the *occupation* of land, the *taking* of private property, including homes, and the *ousting* of persons from their own privately held businesses, without due process of law. I do not refer here to expropriation by legal proceedings of any kind; I refer to the actual *forceful occupation, taking* and *ousting* of persons from their own property, without any semblance of a legal proceeding. Of course, this is without mentioning the far more important deprivation of life and liberty without process of law that has occurred and is still occurring in Portugal. It is clear from the news reports and even those attached to the defendants' reply affidavit that (i) the political and legal situation in Portugal is still very much in a turbulent and unpredictable stage; (ii) that the military still continue to have, at least for the present, a substantial voice in Portuguese affairs; (iii) that the Communists will likewise continue to have a substantial voice in Portuguese affairs. I can state categorically that the conclusion contained in the affidavit of the attorney, Jerome Teich, Esq., attached to the defendants reply affidavit herein that there is no litigant who can legitimately fear maltreatment at the hands of the Portuguese judicial system, and that the Courts of Portugal operate no differently than the Courts in New York, is not a description of the situation in Portugal. The concern as to the maintenance of the integrity of the Portuguese Courts which Mr. Teich alludes to in his affidavit stems from killings gone unpunished, the theft of property without redress, and the occupation of land without protection to the owners thereof from the law.

Appendix C.

Even with regard to my specific situation and the defendants herein, in the early part of 1975, *all* of the directors of each of the defendants were arbitrarily ousted from their offices by dictate of the government and supplanted by individuals with strong connections and allegiances to the governmental clique in power at the time. Specifically, in about March 1975, Mr. Jose Antonio Tavares Ferreira De Lima; Mr. Antonio Calapez Gomes Garcia and Mr. Jose Lourenco De Almeida Castello Branco, all of whom are referred to as prospective witnesses in Exhibit "D" attached to defendants' reply affidavit, and another individual, were ousted from their directorships with the defendant UNISUL and respectively

Appendix C.

with the defendants, SADO, MIRA, SORRAIA and ROXO. They were supplanted by the individuals whose names are also contained on the said Exhibit "D", viz., Mr. Jose Manuel Loureiro Da Silva; Mr. Antonio Da Conceicao Tavares; Miss Maria Julia Costa Paixo; Mr. Vitor Manuel Vinagre Poitout; Mr. Carlos Alberto Oliveira Damas; Mr. Jose Francisco Campina Sequeira Cantinho; and Mr. Victor Papoula Pereira. It is important to bear in mind that defendants were, at least at the time, private companies, and that the ouster took place without any benefit of due process of law. Most important of all, the new directors, placed in their positions by the governmental clique, acted thereafter in accordance with its directives *and they are still in office,* notwithstanding the election. As a further example of the situation in Portugal, the individual Mr. Joaquim Antonio Rosado Gusmao, also referred to in the said Exhibit "D" had, in connection with my opposition to defendants' motion for summary judgment in the Federal Court which I have alluded to above, supplied me with a telex statement factually supporting my position in this lawsuit. Within a month thereafter, he was threatened by agents of the defendants in Portugal in his own home, and recenty received a legal process issued by a Ministry of the Portuguese government. I submit that the strong relationship between the present management of the defendants and the Portuguese government or, at least, a clique with a strong voice in that government, and the demonstrated ability of that clique and the management of the defendants to effect political as well as legal decisions will render it impossible for me to obtain any justice in Portugal. The results of the recent election are, at least for the present, unclear and superficial. The country of my birth will have to undergo a long process of democratization and political education in order to overcome the effects of years of authoritarian control followed by Communist

Appendix C.

and military rule, interspersed with anarchy and chaos, before any semblance of the rule of law will be available to all litigants—especially foreign litigants in that country. (154-157)

• • • • •

WHEREFORE, it is respectfully prayed that the within application be in all respects denied.

JOSEPH CHRISTOVAO

Sworn to by Joseph Christovao
May 4, 1976

Appendix C.

Affidavit of Joseph Christovao in Opposition to Motion Sworn to May 12, 1976.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Plaintiff,

against

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L., et al,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH CHRISTOVAO, being duly sworn, deposes and says:

I make this affidavit in further opposition to the instant motion of the defendants to dismiss on the doctrine of inconvenient forum and other grounds.

Attached hereto is the Telex statement, in Portuguese, of Manuel Cortes Rosa, a Portuguese attorney and a former member of the faculty of the Law School of the University of Lisbon, which conclusively supports my statement in prior affidavits that, should this motion be granted and the action adjudicated in Portugal, I will have absolutely no guarantee of a fair and impartial trial under the rule of law in the courts of that nation.

This affidavit is prompted by the affidavits of defendants submitted in support of this motion, sworn to on April 28, 1976 and May 4, 1976, and received by my attorneys, respectively, within a few days before and on the day before

Appendix C.

the return date of this motion. I am advised that the Court granted me time, until today, to file any further opposition affidavits. I received the Telex of Mr. Rosa, which I requested be directed by him to my attorneys, yesterday evening. I translated the Telex to English myself, and I affirm the accuracy of that translation. I attach the translation to these papers.

The clear conclusion of Mr. Rosa is that today, even after the recent Portuguese election which defendants seek to make so much of, the Portuguese juridical system operates under a constitution which is fundamentally Marxist and class-oriented in ideology and that the fundamental law of the land brings about a situation where it is impossible to guarantee a fair trial of this action in Portugal where the defendants, and each of them, are Portuguese agricultural cooperatives whose management and control have been usurped by the interests in Portugal representing the so-called "working class."

I have already referred, in my prior affidavits, to the expropriation and ousting of the prior owners and manageemnt of the defendants by the Communist and leftist clique in Portugal in early 1975. That clique since that time orchestrates the actions and objectives of the defendants in the name of the "working class" of Portugal in what is, at least purportedly, the interest of the "working class." The domination and control of the defendants since early 1975 was brought about, and has since been conducted, in the name of a class or Marxist ideology. While I deny that these companies actually function for the benefit of the poor and working people of Portugal, the interest that they espouse is that of a special class—the "working class"—which is synonymous with the Communist or leftist clique in control.

Mr. Rosa delineates in detail, by way of illustration and in support of his conclusion, some of the specific provisions of the new Portuguese constitution of April 25, 1976. It

is this constitution, as Mr. Rosa demonstrates, that the courts of Portugal must operate under as the fundamental law of the land. Mr. Rosa demonstrates that, even apart from the "mob or people's tribunals" method of judicial determination prior to November, 1975, there exists even today under the written law of Portugal a fundamental absence of the basic guarantee of impartial justice under law where the interests of this Marxist or class clique are involved.

In addition, I attach hereto the telegram received by me only today from the United States Department of State in Washington, replying to my inquiry as to the authenticity and basis of the Telex from the United States Embassy in Lisbon, attached as Exhibit "1" to defendants' affidavit sworn to on May 4, 1976. This telegram states in pertinent part:

> ". . . PLEASE BE ADVISED THAT THE DEPARTMENT OF STATE IS NOT AN EXPERT IN FOREIGN LAW AND THEREFORE DOES NOT CONSIDER IT APPROPRIATE TO DELIVER OPINIONS CONCERNING THE *ADEQUACY* AND *IMPARTIALITY* OF FOREIGN LEGAL SYSTEMS"
>
> [emphasis mine]

Clearly, the Telex, purportedly from the United States Embassy in Lisbon, is without authority and certainly without basis.

WHEREFORE, I respectfully pray that the instant motion be in all respects denied.

Joseph Christovao

SWORN to before me this
12th day of May, 1976

VITO R. VINCENTI
Notary Public, State of New York
No. 30-9467200
Qualified in Nassau County
Commission Expires March 30, 1978

Exhibit Annexed to Affidavit of Joseph Christovao—Statement of Manuel Jose Cortes Rosa (in English) in Opposition to Motion.

VINCENTI & SCHICKLER, Esqs.

Attention Mr. Vito Vincenti

New York City

Dear Colleague:

Confirming and expanding on the telephone conversation we had last Wednesday, May 5, 1976, I beg your attention to the following:

1. My complete name is MANUEL JOSE CORTES ROSA, although as a rule I only use MANUEL CORTES ROSA. I was born in Reguengos de Monsaraz, Portugal on March 23, 1976, and I obtained my degree of law from the Law School of the University of Lisbon on October 18, 1958. In addition, on July 29, 1959, I completed in the Law School of Lisbon University a post-graduate course [complimentary course of Jurisprudence Sciences].

Since February 1960 and until October 1968, I taught the courses of criminal law and criminal procedure at the Law School of Lisbon University.

In addition to my above referred to teaching functions in the faculty of Lisbon University Law School, I practiced law in Lisbon from August 1966 up to November 1975, without interruption. In November 1975, I left Portugal to reside in Munich, West Germany. I work here as a researcher in the "Institut Fuer Die Gesamten Strafrectswissenschaftern" of the University of Munich under the direction of the German Penal Law Specialist, Professor Dr. Claus Roxin.

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2. My coming to Germany was fundamentally motivated by the impossibility of resuming in 1975, as was my wish, my teaching career in the faculty of the Law School of the University of Lisbon due to the extremely abnormal circumstances under which that school is presently functioning. As a matter of fact, all the members of the faculty of the Law School of the University that, at the time of the Portuguese revolution of April 25, 1974, who were exercising these functions, have meanwhile left the University: the majority on account of having been compulsively forced out and the rest because in view of the circumstances, chose to leave voluntarily.

As is evident, this situation in the Law School of the University of Lisbon—one of the only two law schools in Portugal—cannot but have the most grave consequences for all aspects in the life of Portuguese Jurisprudence. It will be sufficient to say that at present, the teachings in this Law School are conducted and controlled by persons nominated or elected to the faculty positions on the basis of their ideological or party affiliations, without having any academic or professional background that may, in any view—whether from near or afar—justify their selection for the exercise of functions as members of a faculty in any university.

3. Addressing myself directly to the matter which I have been asked to give my opinions, I submit in advance my conclusion that later on, I will attempt to justify, and which is the following:

In my opinion, there presently exists the grave danger of the Portuguese Courts, notwithstanding the independence and courage of the major part of our judges, not affording the possibility of being impartial in legal proceedings involving interests belonging exclusively or fundamentally to the so-called labor class or to entities where the management is controlled by the workers in such a way

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that the interests of such entities are identified with those of the labor class.

I will now justify this conclusion which the most elementary fairness requires me to emphasize, has nothing to do with the independence and courage of the great majority of the Portuguese judges.

4. I could start by citing in support of my conclusion, referred to above, the grave violations committed in Portugal after the April 25, 1974 revolution, of fundamental rights against small and large business owners and managers in homage to an unrestrained and unbridled demagoguery, without the Courts having, legally or de facto, any possibility to prevent or cease these injustices.

In truth, commencing already in September 1974, but more intensively after March 1975 and continuing to the date of my leaving Portugal [November 11, 1975] there were numerous arrests in Portugal of small and large businessmen under the pretext of their having committed acts of "economic sabotage", without there existing any concrete foundation for their arrest and with even less reason for their continued detention, which detentions, in many cases, continued for long periods of time without the persons detained having the possibility, legally and/or de facto of challenging the injustices of which they were victims.

On the other hand, in legal proceedings involving so-called members of the working class, as defendants, Courts were prevented from pronouncing their decisions, or the decisions of these Courts, unfavorable to these defendants, were purely and simply rejected, without the public authorities being able to or desiring to intervene in defense of the authority and prestige of the Courts. The most well-known case of this type of legal procedure was one involving one named "Jose Diogo", a rural worker that had assassinated his employer and who was taken by the

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mob from the courthouse where he was present for trial and after "absolved" by the same mob constituted in a "popular tribunal" and who paraded in triumph as a symbol of victory for the working class.

5. It is not, however, with cases such as I have just cited that I fundamentally support myself in arriving at the conclusion referred to above in Paragraph "3". In truth, according to the news which I received from Portugal after my coming to Germany, cases, such as those referred to in paragraph "4" above were not, at least with the same frequency, repeated after November 25, 1975, the date on which an attempted coup d'etat by some leftist parties, including the Portuguese Communist Party was uncovered and suppressed.

6. The fundamental reason which leads me to arrive at the conclusion which I have stated in paragraph "3" above is that the new constitution of the Portuguese Republic of April 1976, which came into effect on April 25, 1976, necessarily places the Courts in the position of facing the most grave dilemma of respecting the unconditional supremacy of the interests of a specific class [the working class] or disobeying the spirit of the fundamental law of the land which is now the said constitution. In truth, the constitution of the Portuguese Republic of April 1976 is, clearly, a constitution of Marxist ideology based on the idea of the importance of respecting the predominance of the interests of a specific class within the Portuguese society, for so long as the Marxist ideal of a classless society has not been realized.

I now pass to set forth textually as proof of what I have just affirmed, some provisions of the referred to constitution of the Portuguese Republic of April 1976:

Appendix C.

ARTICLE 1.

Portugal is a sovereign Republic based on the dignity of the human person and on the popular will and pledged to its transformation to a classless society.

ARTICLE 2.

The Portuguese Republic is a democratic state based on popular sovereignty, on the respect and guarantee of the rights and fundamental liberties, and on the pluralism of expression and democratic political organization, which has as its objective to assure the transition to socialism through the creation of conditions for the democratic exercise of power by the working classes.

ARTICLE 9.

The fundamental tasks of the State are:
(c) To socialize the means of production and wealth through adequate procedures characteristic of the present historical period, to create conditions that permit the promotion of the well-being and quality of life of the people, especially that of the working classes, and to abolish the exploitation and oppression of man by man.

ARTICLE 10, No. 2.:

The evolution of the revolutionary process imposes upon the economic plan the universal appropriation of the main means of production.

ARTICLE 80.:

The economic social organization of the Portuguese Republic lies in the development of the relations of

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socialistic production through the collective appropriation of the main means of production and land, as well as natural resources, and the exercise of the democratic power by the working classes.

ARTICLE 82., No. 2.:

The law may determine that the expropriation of large landowners and of large proprietors and business owners or stockholders have no right to any indemnification whatsoever.

7. I think that the mandates of the Portuguese constitution of April 1976 that I have set forth are sufficiently illustrative to demonstrate that if they are to be faithfully adhered to, as they must be, in spirit as the fundamental law of the country, it will prove to be very difficult for the Portuguese Courts to be able to render impartial decisions when there is involved the interests of the "working classes" to whom the said constitution give unconditional predominance and this will occur, most likely, when there are at stake the interests of companies, whose management is entirely controlled by workers, which in this case, identify their own interest with those of the said companies.

MUNICH

May 11, 1976
MANUEL CORTES ROSA

Exhibit Annexed to Affidavit of Joseph Christovao

Telex (in Portuguese) of Manuel Rosa

A1847/11•

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VINCENTI AND SCHICKLER, ESQS.

ATTENTION MR. VITO VINCENTI

NEW YORK CITY

PREZADO COLEGA,

EM CONFIRMACAO E DESENVOLVIMENTO DA CONVERSA TELEFONICA QUE TIVEMOS NA PASSADA QUARTA FEIRA, 5 DE MAIO DE 1976, SOLICITO A SUA ATENCAO PARA O SEGUINTE:

1. - O MEU NOME COMPLETO E MANUEL JOSE CORTES ROSA, EMBORA EU HABITUALMENTE USE APENAS MANUEL CORTES ROSA.

NASCI EM REGUENGOS DE MONSARAZ (PORTUGAL) EM 23 DE MARCO DE 1936 E OBTIVE O GRAU DE LICENCIADO EM DIREITO NA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA EM 18 DE OUTUBRO DE 1958. EM 29 DE OUTUBRO, DIGO, EM 29 DE JULHO DE 1959 CONCLUI, TAMBEM NA FACUL-

Exhibit Annexed to Affidavit of Joseph Christovao

DADE DE DIREITO DA UNIVERSIDADE DE LISBOA, UM CURSO PARA POS-GRADUADOS (CURSO COMPLEMENTAR DE CIENCIAS JURIDICAS).

DESDE FEVEREIRO DE 1968 ATE OUTUBRO DE 1968 DESEMPENHEI FUNCOES DOCENTES NA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA, NAS DISCIPLINAS DE DIREITO CRIMINAL E PROCESSO CRIMINAL.

ALEM DAS REFERIDAS FUNCOES DOCENTES EXERCI A ADVOCACIA EM LISBOA DESDE AGOSTO DE L966 ATE NOVEMBRO DE 1975, ININTERRUPTAMENTE. EM 9 DE NOVEMBRO DE 1975 SAI DE PORTUGAL PARA FIXAR RESIDENCIA EM MUNIQUE, ALEMANHA OCIDENTAL. TRABALHO AQUI COMO INVESGADOR NO 'INSTITUT FUER DIE GESANTEN STRAFRECHTSWISSENSCHAFTEN' DA UNIVERSIDADE DE MUNIQUE, SOB A DIRECCAO DO PENALISTA ALEMAO PROF. DR. CLAUS ROXIN.

2. - A MINHA VINDA PARA A ALEMANHA FOI FUNDAMENTALMENTE MOTIVADA PELA IMPOSSIBILIDADEDE, DIGO, PELA IMPOSSIBILIDADE DE EU RETOMAR, EM 1975, COMO ERA MEU DESEJO, A CARREIRA DOCENTE NA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA, DADAS AS CIRCUNSTANCIAS ANOMALISSIMAS EM QUE SE ENCONTRA A FUNCIONAR ESSA FACULDADE. EFECTIVAMENTE, TODOS OS MEMBROS DO CORPO DOCENTE DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA QUE, A DATA DA REVOLUCAO PORTUGUESA DE 25 DE ABRIL DE 1974 , SE ENCONTRAVAM NO SEU EXERCICIO DE FUNCOES DEIXARAM ENTRETANTO A FACULDADE: A MAIOR PARTE DELES, POR TEREM SIDO COMPULSIVAMENTE AFASTADOS E OS RESTANTES PORQUE, EM FACE DAS CIRCUNSTANCIAS, PREFERIRAM SAIR VOLUNTARIAMENTE.

COMOEEVIDENTE, ESTA SITUACAO DA FACULDADE DE DIREITO DA UNIVE DIGO, DA UNIVERSIDADE DE LISBOA - UMA DAS DUAS UNICAS FACULDADES DE DIREITO DE QUE PORTUGAL DISPOE -NAO PODE DEIXAR DE TER AS MAIS GRAVES CONSEQUENCIAS PARA TODA VIDA JURIDICA PORTUGUESA. BASTARA DITER, DIGO, BASTARA DIZER QUE ACTUALMENTE O ENSINO NA REFERIDA FACULDADE E MINISTRADO POR PESSOAS QUE SAO NOMEADAS OU ELEITAS PARA

Exhibit Annexed to Affidavit of Joseph Christovao

OS CARGOS DOCENTES EM RAZAO DA SUA FILIACAO IDEOLOGICA OU PARTIDARIA, SEM QUE TENHAM UMA CARREIRA ACADEMICA OU CIENTIFICA QUE POSSA, DE PERTO OU DE LONGE, JUSTIFICAR A SUA ESCOLHA PARA O EXERCICIO DE ACTIVIDADES DOCENTES NUMA UNIVERSIDADE.

3. - ENTRANDO AGORA DIRECTAMENTE NA MATERIA SOBRE A QUAL ME E PEDIDO QUE ME PRONUNCIE, ADIANTO DESDE JA A MINHA CONCLUSAO, QUE ADIANTE PROCURAREI JUSTIFICAR E QUE E A SEGUINTE:

- CONSIDERO EXISTENTE O GRAVE PERIGO DE OS TRIBUNAIS PORTUGUESES, APEAR, DIGO, APESAR DA INDEPENDENCI A E CORAGEM DA ESMAGADORA MAIORIA DOS NOSSOS JUIZES, NAO TEREM ACTUALMENTE A POSSIBILIDADE DE SERIMPAR, DIGO, DE SER IMPARCIAIS, EM PROCESSOS EM QUE ESTEJAM EM CAUSA INTERESSES QUE PERTENCAM, EXCLUSIVA OU FUNDAMENTALMENTE, A CHAMADA CLASSE TRABALHADORA, OU A EMPRESAS CUJA GESTAO ESTEJA A SER CONTROLADA PELOS TRABALHADORES EM TERMOS TAIS QUE LEVEM A IDENTIFICAR OS SEUS INTERESSES COM OS DA CLASSE TRABALHADORA.

PASSOAJUSTIFICAR ESTA CONCLUSAO, DIGO, PASSO A JUSTIFICAR ESTA CONCLUSAO QUE, INSISTO, NADA TEM A VER COM A INDEPENDENCIA E CORAGEM QUE E DA MAIS ELEMENTAR JUSTICA RECONHECER NA GRANDE MAIORIA DOS JUIZES PORTUGUESES.

4. - PODERIA COMECAR POR CITAR, EM APOIO DA CONCLUSAO ACIMA REFERIDA , DIGO, ACIMA REFERIDA , AS GRAVES VIOLACOES DE DIREITOS FUNDAMENTAIS COMETIDAS EM PORTUGAL, APOS A REVOLUCAO DE 25 DE ABRIL DE 1974, CONTRA PATROES E EMPRESARIOS, EM HOMENAGEM A UMA DEMAGOGIA DESENFREADA, SEM QUE OS TRIBUNAIS TIVESSEM, LEGALMENTE OU DE FACTO, A POSSIBILIDADE DE EVITAR OU POR RAPIDAMENTE COBRO A TAIS INJUSTICAS.

NA VERDADE, JAAPARTIR DE SETEMBRO DE 1974, MAS MAIS INTENSA-

MENTE A PARTIR DE MARCO DE 1975, EATE A DATA DA MINHA SAIDA DE PORTUGAL (9.11.75), FORAM PRESOS EM PORTUGAL NUMEROSOS PATROES E EMPRESARIOS A PRETEXTO DE TEREM COMETIDO ACTOS DE 'SABOTAGEM ECONOMICA', SEM QUE EXISTISSEM FUNDAMENTOS CONCRETOS PARA ESSAS DETENCOES E MUITO MENOS AINDA PARA A SUA MANUTENCAO, QUE EM BASTANTES CASOS SEP, DIGO, SE PROLONGOU POR LARGO TEMPO, SEM QUE OS DETIDOS TIVESSEM A POSSIBILIDADE LEGAL E/OU DE FACTO DE REAGIR CONTRA AS INJUSTICAS DE QUE ERAM VITIMAS.

POR OUTRO LADO, EM PROCESSOS EM QUE OS REUS PERTENCIAM A CHAMADA CLASSE TRABALHADORA OS TRIBUNAIS FORAM IMPEDIDOS DE PROFERIR AS SUAS DECISOES OU FOI RECUSADO PURA ESIMPLESMENTE O ACATAMENTO DE DECISOES DESFAVORAVEIS AOS REUS, SEM QUE A FORCA PUBLICA PUDESSE OU QUISESSE INTERVIR EM DEFESA DA AUTORIDADE E DO PRESTIGIO DOS TRIBUNAIS. O CASO MAIS GRITANTE DESTE TIPO DE PROCESSOS FOI O DE UM TAL 'JOSE DIOGO', UM TRABALHADOR RURAL QUE HAVIA ASSASINADO O PATRAO E QUE FOI ARRANCADO PELA POPULACA DO TRIBUNAL ONDE DEVIA SER JULGADO E DEPOIS 'ABSOLVIDO' PELA MESMA POPULACA (CONSTITUIDA EM 'TRIBUNAL POPULAR') E PASSEADO EM TRIUNFO, COMO SIMBOLO DE VITORIA DA CLASSE TRABALHADOR., DIGO, CLASSE TRABALHADORA.

5. - NAOE,POREM, NA EXISTENCIAS, DIGO, NA EXISTENCIA DE CASOS COMO OS QUE ACABO DE INDICAR QUEFUNDA, DIGO, QUE FUNDAMENTALMENTE ME APOIO, PARA EXTRAIR A CONCLUSAO INDICADA, DIGO, A CONCLUSAO ENUNCIADA ACIMA, NO NUMERO 3. NA VERDADE , SEGUNDO AS NOTICIAS QUE ME CHEGAM DE PORTUGAL APOS A MINHA VINDA PARA ALEMANHA, CASOS COMO OS INDICADOS NO NUMERO 4 NAO TERAO VOLTADO A REPETIR-SE, PELO MENOS COM FREQUENCIA, APOS 25 DE NOVEMBRO DE 1975, DATA EM QUE FOI DESCOBERTA E DOMINADA UMA TENTATIVA DE GOLPE DE ESTADO PROMOVIDA POR ALGUNS PARTIDOS DE ESQUERDA, ENTRE ELES O PARTIDO COMUNISTA

PORTUGUES.

6. - A RAZAOQUE, FUNDAMENTALMENTE, ME LEVA A EXTRAIR A CONCLUSAO ENUNCIADA NO NUMERO 3 E A DE QUE A NOVA CONSTITUICAO DE , DIGO, A NOVA CONATITUICAO DA REPUBLICA PORTUGUESA DE ABRIL DE 1976, QUE ENTROU EM VIGOR EM 25 DE ABRIL DE 1976, COLOCA NECESSARIAMENTE OS TRIBUNAIS PERANTE O GRAVISSIMO DILEMA DE RESPEITAR A SUPREMACIA INCONDICIONAL DOS INTERESSES DE UMA DETERMINADA CLASSE (A CLASSE TRABALHADORA) OU DESOBEDECER AO ESPIRITODA, DIGO, ESPRITO DA LEI FUNDAMENTAL DO PAIS, QUE E AGORA ADITA, DIGO, A DITA CONSTITUICAO. NA VERDADE, A CONSTITUICAO DA REPUBLICA PORTUGUESA DE ABRIL DE 1976 E, CLARAMENTE, UMA CONSTITUICAO DE INDOLE MARXISTA, ASSENTE NA IDEIA DE QUE IMPORTA RESPEITAR O PREDOMINIO DE INTERESSES DE UMA DETERMINADA CLASSE DENTRO DA SOCIEDADE PORTUGUESA, ENQUANTO NAO FOR POSSIVEL REALIZAR O IDEAL MARXISTA A LONGO PRAZO, QUE E A SOCIEDADE SEM CLASSES.

PASSOAREPRODUZIR TEXTUALMENTE, COMO PROVA DO QUE ACABO DE AFIRMAR, ALGUNS PRECEITOS DA REFERIDA CONSTITUICAO DA REPUBLICA PORTUGUESA DE ABRIL DE 1976:

ARTIGO1. :PORTUGAL E UMA REPUBLICA SOBERANA, BASEADA NA DIGNIDAB DIGO, NA DIGNIDADE DA PESSOA HUMANA E NA VONTADE POPULAR E EMPENHADA NA SUA TRANSFORMACAO NUMA SOCIEDADE SEM CLASSES.

ARTIGO 2. :A REPUBLICA PORTUGUESA E UM ESTADO DEMOCRATICO, BASEADO NA SOBERABIA, DIGO, NA SOBERANIA POPULAR, NO RESPEITO E NA GARANTIA DOS DIREITOS E LIBERDADES FUNDAMENTAIS E NO PLURALISMO DE EXPRESSAO E

Exhibit Annexed to Affidavit of Joseph Christovao

E ORGANIZACAO POLITICA DEMOCRATICAS. QUE TEM POR OBJECTIVO ASSEGURAR A TRANSICAO PARA O SOCIALISMOMEDIANTE A CRIACAO DE CONDICOES PARA O EXERCICIO DEMOCRATICO DO PODER PELAS CLASSES TRABALHADORAS.

ARTIGO 9. :SAOTAREFAS FUNDAMENTAIS DO ESTADO :

C) SOCIALIZAR OS MEIOS DE PRODUCAO E A RIQUEZA, ATRAVES DE FORMAS ADEQUADAS AS CARACTERISTICAS DO PRESENTE PERIODO HISTORICO, CRIAR AS CONDICOES QUE PERMITAM PROMOVER O BEM-ESTAR E A QUALIDADE DE VIDA DO POVO, ESPECIALMENTE DAS CLASSES TRABALHADORAS, E ABOLIR A EXPLORACAO E A OPRESSAO DO HOMEM PELO HOMEM.

ARTIGO18., NUMERO 2. : O DESENVOLVIMENTO DO PROCESSO REVOLUCIONARIO IMPOE , NOPLANOECONO, DIGO, NO PLANO ECONOMICO, A APRV

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ARTIGO18., NUMERO 2 : O DESENVOLVIMENTO DO PROCESSO REVOLUCIONARIO IMPOE, NO PLANO ECONOMICO, A APROPRIACAO COLECTIVA DOS ORINCIPAIS , DIGO, DOS PRINCIPAIS MEIOS DE PRODUCAO.

Exhibit Annexed to Affidavit of Joseph Christovao

ARTIGO 80. : A ORGANIZACAO ECONOMICO-SOCIAL DA REPUBLICA PORTUGUESA ASSENTA NO DESENVOLVIMENTO DAS RELACOES DE PRODUCAO SOCIALISTAS, MEDIANTE A APROPRIACAO COLECTIVA DOS PRINCIPAIS MEIOS DE PRODUCAO E SOLOS, BEM COMO DOS RECURSOS NATURAIS, E O EXERCICIO DO PODER DEMOCRATICO DAS CLASSES TRABALHADORASM.

ARTIGO 82., NUMERO 2. :ALEIPODE DETERMINAR QUE AS EXPROPRIACOES DE LATIFUNDIARIOS E DE GRANDES PROPRIETARIOS E EMPRESARIOS OU ACCIONISTAS NAO DEEM LUGAR A QUALAUQER, DIGO, A QUALQUER INDEMNIZACAO.

7.-JLUGO, DIGO, JULGO QUE OS PRECEITOS DA CONSTITUICAO PORTUGUESA DE ABRIL DE 1976 QUE ACABO DE TRANSCREVER SAO SUFICIENTEMENTE ELUCIDATIVOS NO SENTIDO DE DEMONSTRAR QUE , SE QUISEREM MANTER-SE FIEIS, COMO DEVEM, AO ESPIRITO DA LEI FUNDAMENTAL DO PAIS, MUITO DIFICILMENTE OS TRIBUNAIS PORTUGUESES PODERAO PROFERIR DECISOES IMPARCIAIS QUANDO ESTEJAM EM CAUSA INTERESSES DAS 'CLASSES TRABALHADORAS' , A QUE A DITA CONSTITUICAO CONCEDE INCONDICIONAL PREDOMINANCIA. E O MESMO SE VERIFICARA, MUITO PROVAVELMENTE, QUANDO ESTIVEREM EM CAUSA INTERESSES DE EMPRESAS CUJA GESTAO ESTEJA INTEIRAMENTE CONTROLADA PELOS TRABALHADORES, QUE, NESSA HIPOTESE, IDENTIFICAM COM OS SEUS PROPRIOS INTERESSES OS DAS ALUDIDAS EMPRESAS.

Exhibit Annexed to Affidavit of Joseph Christovao

MUNIQUE, 11 DE MAIO DE 1976

MANUEL CORTES ROSA

•

MERCANT 223187

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Exhibit Annexed to Affidavit of Joseph Christovao

Telex, U. S. Department of State

western union **Telegram**

NYD209(2219)(1-040831A132)PD 05/11/76 2218
ICS IPMDCNC NYK
03252 (1-029312C132003 1618) 05-11
ICS IPMYS31
TLX SECSTATE WSH
GOVT PD SD WASHDC
MR JOSEPH CHRISTOVAO JR (NFL)
225 BDWAY
NEWYORK NY

4531

DEAR MR CHRISTOVAO: IN RESPONSE TO YOUR LETTER RECEIVED TODAY, PLEASE BE ADVISED THAT THE DEPARTMENT OF STATE IS NOT EXPERT IN FOREIGN LAW AND THEREFORE DOES NOT CONSIDER IT APPROPRIATE TO DELIVER OPINIONS CONCERNING THE ADEQUACY AND IMPARTIALITY OF FOREIGN LEGAL SYSTEMS
SIGNED HAROLD S RUSSELL ASST LEGAL ADVISOR

SF-1201 (RS-69)

western union **Telegram**

FOR EUROPEAN AFFAIRS DEPT OF STATE WASHINGTON
DC 20520
NNNN

SF-1201 (RS-69)

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANT OF WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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MARTIN R. LEE
ANN H. APPELBAUM
WARSHAW, SYLVESTER, BURSTEIN & FRANKS
Of Counsel

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Douglas v. New York, N.H. and H.R., 279 U.S. 377 (1929)	10
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Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518 (1947)	10

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Silver v. Great American Insurance Company, 29 N.Y.2d 356, 278 N.E.2d 623, 328 N.Y.S.2d 398 (1972)	9, 13
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Blair, "The Doctrine of Forum Non Conveniens", 29 Col. L. Rev. 1 (1929)	9
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IN THE

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JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

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ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANT OF WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions Below

As Petitioner failed to comply with this Court's Rule 40(a), Respondents here recite the opinions with the man-

dated correct citations. Also, Petitioner has failed to mention the denials of permission to appeal to the New York Court of Appeals by both the Appellate Division and the Court of Appeals.

The opinion of the Supreme Court of the State of New York, County of New York, Special Term is not reported, but is appended to Petitioner's Brief as Appendix A, pp. 1a-4a.* The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, appended to petitioner's brief, is reported in 55 A.D. 2d 561, 390 N.Y.S.2d 71 (Appendix A, pp. 5a-11a). The opinion of the New York Court of Appeals, appended to Petitioner's Brief, dismissing Petitioner's Appeal to that court is reported in 41 N.Y. 2d 338, 392 N.Y.S. 2d 609 (Appendix A, pp. 11a-13a). Permission so to appeal to the Court of Appeals was denied on April 12, 1977 by the Appellate Division. Permission to appeal was denied by the Court of Appeals on July 5, 1977. Neither order of denial has been reported as yet.

Jurisdiction

The questions involved herein are not open to review in this Court. *State of Missouri ex. rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950). As Mr. Justice Frankfurter said in that case, "Whether a state makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens,* a question of State law not open to review here." (340 U.S. at 4.) *See also Adkins* v. *Underwood,* 520 F.2d 890, 894 (7th Cir. 1975), *cert. denied,* 423 U.S. 1017 (1975).

* Figures in parentheses with the letter "a" refer to pages in the Appendix to the Petition.

In addition, the jurisdictional statement does not satisfy Rule 19(a) of the Rules of this Court. It does not set forth that a state court has decided a "federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." A full explanation of this rule is made in an article in the Record of the Association of the Bar entitled "Manning the Dikes" by Mr. Justice John M. Harlan, 13 The Record of The Association of The Bar of The City of New York 541, 550-553, delivered as the Eighteenth Benjamin N. Cardozo lecture.

Questions Presented

The first question presented by Petitioner, whether CPLR 327 is constitutional, is clear.

The second question presented by Petitioner is not clear. His brief states that the question is: "Is the rule [CPLR 327] as applied unconstitutional as repugnant to Section 1 of the Fourteenth Amendment." This is so broad as to be meaningless unless there is added something indicating in what respect its application was unconstitutional.

On an analysis of the petition, the question seems to be "Is Rule 327 unconstitutional in permitting transfer of the case from New York to Portugal, a communist country in which Petitioner cannot get a fair trial since he is a resident of New York?"

The Reasons the Writ Should Be Denied

1. Petitioner's petition raises no substantial constitutional question as required by Rule 19(a) of this Court's Rules.

2. The petition fails to demonstrate, as indeed it could not demonstrate, compliance with Rule 23(f) of this Court's rules. Rule 23(f) mandates that where a review of a state court's judgment is sought, petitioner must

> "... show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

As is clear from an examination of the record on appeal, the question was not raised in any way whatsoever in the Court of original instance. Notwithstanding Petitioner's contention that it was implicitly raised there, it was completely ignored and was raised for the first time in the Appellate Division of the Supreme Court of the State of New York. It was given short shrift both there and in the three subsequent attempts by Petitioner to obtain reversal of the original motion decided in Respondents' favor.

Statement

Petitioner's statement, insofar as it relates to the basic recitation of the progess of the case through his repeated unsuccessful appeals, is accurate. In all other respects it is replete with irrelevant misstatements unsupported by the record. Most importantly, the Petitioner attempts to reraise in this Court the factual issues raised in every court below which are not before this Court at the present time. His attempt to address Respondents' supposed waiver, the supposed inability to get a fair trial in Portgual and the rambling references to the underlying business relationship

of the parties, have all been disposed of by the courts below in the original finding that Portugal was the proper forum and that Petitioner's arguments against it were found wanting (Appendix A, pp. 1a-4a). The sole possible question before this Court would be the constitutionality of Rule 327 of the Civil Practice Law and Rules as improperly denying due process or equal protection of the law to an alien resident.

As found by the Trial Court, quasi in rem jurisdiction in this matter was obtained by an Order of Attachment, dated November 17, 1975, followed by the attachment of approximately $185,000 and personal service of the Summons and Complaint upon Respondents in Portugal (see Appendix A, p. 1a and Petitioner's Statement, page 5). Respondents are Portuguese agricultural cooperatives corporations principally engaged in raising and processing tomatoes (Appendix A, p. 1a), except for Respondent Unisul, a Portuguese corporation which is their marketing agent (Appendix A, p. 1a). Petitioner is a Portuguese citizen and a resident of New York. As the Trial Court found, it is undisputed that the agreement was executed in Portugal (Appendix A, p. 2a).

As set forth in Petitioner's statement (p. 5), Petitioner's complaint is a complicated one, as follows:

> "Petitioner's complaint alleges five causes of action as follows: First, the tortious and intentional destruction of petitioner's business; second, the breach of a joint venture agreement; third, an action for fraud; fourth, interference with third-party contractual relations, and fifth, the breach of a written agency agreement."

The alleged joint venture agreement is oral (Appendix A, p. 1a). It thus appears that this is an action be-

tween aliens for breach of an agreement made in Portugal and properly belongs in Portugal.

Petitioner is fluent in Portuguese (Appendix A, p. 3a). The officers and directors of Respondent corporations speak no English, except for Jose Potier, manager of Unisul, who speaks English only slightly (Appendix A, p. 3a). Trial of such a complicated case in New York requiring extensive use of interpreters would be a nightmare.

In any event, the constitutional question was not raised at Special Term of the Supreme Court in New York, the court of first instance, or discussed in its opinion. Petitioner claims it was implicitly raised by his claim that he would not receive a fair trial in Portugal. It was raised expressly for the first time in the Appellate Division on appeal from the order of the court of first instance. The claim of unconstitutionality was not discussed in the majority opinion of the Appellate Division; the Appellate Court merely affirmed for the reasons stated by the Court at Special Term (Appendix A, p. 5a).* The Trial Court, as is clear from the opinion of Mr. Justice Tierney (Appendix A, pp. 1a-4a), discussed the factors which influenced it in deciding that the case should be transferred to Portugal, stating in Appendix A, p. 3a:

> "As to that branch of the motion seeking forum non conveniens relief, it is the court's opinion that 'on balancing the interests and convenience of the parties and the courts (this) action could better be adjudicated in' Portugal, since

* It may be here noted that the New York Court of Appeals, in its opinion (Appendix App. 11a-13a) dismissing Petitioner's appeal to that Court as a matter of right, stated in page 13a of Appendix A that the constitutional question articulated by Appellant is not substantial. There is no constitutional impediment to the application of forum non conveniens to a New York resident.

> 'it plainly appears that New York is an inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties' (Silver v. Great American Ins. Co., 29 N Y 2d 326 [sic] 360, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portugese national and makes frequent business trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugal and plaintiff's affidavits furnish little factual support for the conclusory language of the complaint ascribing tortious conduct here by defendants."

Even the "dissenting"* justices of the Appellate Division agreed with this part of his opinion (Appendix A, p. 10a):

> "With respect to the application of *forum non conveniens* I am in accord with the analysis of Special Term wherein it was observed that 'it is the court's opinion that 'on balancing the interests and convenience of the parties and the courts [this] action could better be adjudicated in' Portugal, since 'it plainly appears that New York is an

* The dissent was not a true one and was found by the Court of Appeals to be, in actuality, a concurrence (Appendix A, p. 13a).

inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties' (Silver v. Great American Ins. Co., 29 NY2d 356, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portuguese national and makes frequent trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugal and plaintiff's affidavits furnish little factual support for the conclusory language of the complaint ascribing tortious conduct here by defendants. Lastly, plaintiff has failed to persuade the court that he will not receive a fair trial in Portugal.' On this basis I conclude that it was proper to refuse to entertain the plaintiff's action."

Despite the finding of the Court of first instance that Petitioner can obtain a fair trial in Portugal, which finding was unanimously affirmed by the Appellate Division with both the Appellate Division and the Court of Appeals declining Petitioner's applications for leave to appeal, Petitioner's statement is devoted to a lengthy discussion of the question of fact, *i.e.* whether Petitioner could obtain a fair trial in Portgual.

Findings of fact so found cannot be reviewed by this Court. *Graver Tank & Mfg. Co., et al.* v. *Linde Air Products Co.*, 366 U.S. 271 (1949).

As Mr. Justice Jackson, speaking for a unanimous Court, said (366 U.S. at 275):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac. Co. 321 U.S. 275, 64 S. Ct. 593, 88 L. Ed. 721; District of Columbia v. Pace, 320 U.S. 698, 64 S. Ct. 406, 88 L. Ed. 408; Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U.S. 364, 62 S. Ct. 1179, 86 L. Ed. 1537; Baker v. Schofield, 243 U.S. 114, 118, 37 S. Ct. 333, 334, 61 L. Ed. 626."

Petitioner, in his brief in Question No. 1 (page 17), discusses Rule 327 as if it were a novel legislative innovation in the law, but, as pointed out by Paxton Blair, Esq. (later Justice Blair of the New York Supreme Court) in his classic article on the subject * (Appendix A, p. 6a), the doctrine has been applied in cases dating back a century although under a different name.

Furthermore, Rule 327 was a specific legislative response to the decision of the New York Court of Appeals in *Silver* v. *Greeat American Insurance Company*, 29 N.Y. 2d 356, 278 N.E. 2d 623, 328 N.Y.S. 2d 398 (1972) (incorrectly cited by Petitioner as 29 N.Y. 2d 326 on page 3a of his appendix). In *Silver*, the Court discussed the history of the doctrine and its present form in New York; Rule 327 was the codification of that case law. For an excellent discussion of *Silver* and CPLR 327 see Schropp, *Forum Non Conveniens —Closing the Gap*, 58 Cornell L. Rev. 782 (1972).

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* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. (1929).

The constitutionality of the doctrine is extensively discussed by Mr. Blair in his article. Moreover, this Court rejected attacks on the constitutionality of forum non conveniens. *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947); *Koster* v. *Lumbermens Mut. Casualty Co.,* 330 U.S. 518 (1947); *State of Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950). *See also Douglas* v. *New York, N. H. & H. R.,* 279 U.S. 377 (1929).

Petitioner contends (page 17) that the last sentence of Rule 327 is unconstitutional and that the doctrine should apply only to residents, and not to Petitioner, a resident alien. Thus, Petitioner is not seeking the equal protection of law, but as a New York resident, claims to be in a privileged class.

In fact, the question of the remittal of a New York plaintiff to a jurisdiction outside the bounds of the United States on grounds of forum non conveniens has been faced by the New York Courts. *Irrigation & Industrial Development Corporation* v. *Indag,* 37 N.Y. 2d 522, 337 N.E.2d 749, 375 N.Y.S. 2d 296 (1975); *Mollendo Equip. Co.* v. *Sekisan Trading Co.,* 7 A.D. 2d 750, 392 N.Y.S. 2d 427 (1st Dept. 1977). In these recent expressions by the Courts of the State of New York, compelling reasons were found, as here, to justify dismissal on grounds of forum non conveniens. In both cases, resident plaintiffs were relegated to prosecution of their suits in courts in, respectively, Switzerland and Japan.

The cases cited by Petitioner in his brief, Page 23, to the effect that forum non conveniens is unconstitutional in relegating Petitioner to the courts of a foreign nation, are actually authority in favor of Respondents' position. As stated by Judge Dawkins in *Burt* v. *Isthmus Development Company,* 218 F.2d 353, 356 (5th Cir. 1955), *cert. denied,* 349 U.S. 922 (1955):

> "That such expressions are unsoundly broad and general is clear, for it has also been held that there exists in the federal courts an inherent power to decline jurisdiction in the interest of justice; and the doctrine of *forum non conveniens* is now well established in federal practice. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055; Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067."

Moreover, *Burt* involved a controversy between citizens of the United States, not a controversy between aliens with respect to a claimed case arising in the country in which both Petitioner and Respondents are citizens.

It ill-behooves Petitioner, a resident of the United States for 22 years but not a citizen, to complain of being relegated to the courts of his native land where he lived for over 20 years and from whose agricultural products he derived 90% of his income (Petitioner's Brief, p. 8).

As in *Burt,* the dismissal here is not because Petitioner is not a United States citizen and merely a resident, but because he should not have additional rights because of this fact.

Likewise, *The Founding Church of Scientology of Washington, D.C.* v. *Verlag, et al.,* 536 F. 2d 429, 435-436 (D.C. Cir. 1976), a case brought in the District of Columbia involving a resident plaintiff, a New York defendant and a controversy regarding a German publication. Jurisdiction was retained by the District of Columbia Court after it weighed various factors, including the fact that both parties were residents of the United States, witnesses were to come

from the United States and abroad and certain questions of law and evidence turned on local law. These questions here have already been decided by the Courts below, adversely to Petitioner.

Plaintiff cites three cases in support of his contention that Rule CPLR 327 is unconstitutional under the due process clause of the Fourteenth Amendment (Petitioner's Brief, page 18). None of these cases ever mentions forum non conveniens nor has any of them any relevance to the proposition for which they are cited by Petitioner. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), held that the petitioners, indigent women, had a right to file a divorce action in the state courts without paying the required $60.00 filing fee since that fee made access to the divorce courts an impossibility for them. The Court expressly limited that case to matrimonial matters, stating:

> "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship." 401 U.S. 371 at 383-384.

Griffin v. *Illinois,* 351 U.S. 72 (1956) held that the requirement that indigent convicted felons pay for trial transcripts to enable them to appeal for reversible error was unconstitutional under the due process clause. The Court relied on factors not present in this case; *Griffin* has no relationship to the questions presented here and does not support Petitioner's position at all. *Armstrong* v. *Manzo,* 380 U.S. 545 (1963) was an action brought by a natural father to have an adoption proceeding where he had been adjudicated as delinquent in the support of his daughter and which allowed the adoption of the child by its natural mother's new husband void for lack of notice. Neither the opinion nor the language supports in any way the Petitioner's contention.

These cases deal with *total* denial of access, not a disposition once access has been granted, which simply remits a litigant to another forum.

In his discussion of the reasons for granting the petition, Petitioner contends that the application of CPLR 327 to Petitioner, a New York resident, renders the statute unconstitutional. The opinion of the Court of Appeals in *Silver* v. *Great American Insurance Company, supra,* unanimously held that the doctrine of forum non conveniens should be extended to include residents of the State of New York. The Court held (29 N.Y.2d at 361-362, 328 N.Y.S. 2d at 402-403):

> "Further thought persuades us that our current rule—which prohibits the doctrine of *forum non conveniens* from being invoked if one of the parties is a New York resident—should be relaxed. Its application should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. Although such residence is, of course, an important factor to be considered, forum *non conveniens* relief should be granted when it plainly appears that New York is an inconvenient

forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut, when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation.

It has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary. (See, e.g., Rosenberg, One Procedural Genie Too Many or Putting *Seider* Back Into Its Bottle, 71 Col. L. Rev. 660, 672; 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶301.07; Smit, Report on Uniform Interstate and International Procedure Act, Thirteenth Annual Report of N.Y. Judicial Conference, 1968, p. 138.) The fact that litigants may more easily gain access to our courts—with the consequent increase in litigation—stemming from enactment of the long-arm statute (CPLR 302), changing choice of law rules see, e.g., Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 and decisions such as Seider v. Roth, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312, requires a greater degree of forbearance in accepting suits which have but minimal contact with New York. (See 1 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 301.07.) With that in mind, it was suggested in Simpson v. Loehmann, 21 N.Y. 2d 305, 312, 287 N.Y.S. 2d 633, 638, 234 N.E. 2d 669, 672; mot. for reargu. den. 21 N.Y. 2d 990, 290 N.Y.S. 2d 914, 238 N.E. 2d 319 that further study be given to the subject of *forum non conveniens*. And, a short time later, the State's Judicial Conference recommended a bill reciting, in part, that '[t]he domicile or residence in this state of

any party to the action shall not preclude the court from staying or dismissing the action.' " (Footnotes omitted.)

Petitioner had no less access to the Court than any other litigant; his plea was disposed of with all the due process, and with all of the equal protection afforded any other litigant.

Conclusion

Petitioner's application is in the main based on his contention that Portugal is a Communist-dominated country, in which he cannot obtain a fair trial, which is a question of fact decided adversely to Petitioner by the New York courts. It would be untenable for this Court to find the facts differently as a basis for its decision when the fact that Portugal is not a Communist-dominated country is so well known as to be a matter of judicial notice.

Of course, in any event, Rule 327 of the Civil Practice Law and Rules of the State of New York is not violative of Section 1 of the Fourteenth Amendment to the United States Constitution, and is not repugnant thereto in any respect, whether as applied in this action or otherwise, and, moreover, in any event Petitioner has failed to meet the burden of this Court's Rules 19(a) and 23(f).

Petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

against

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR INTERVENOR IN OPPOSITION

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OCTOBER TERM, 1977

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JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

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against

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR INTERVENOR IN OPPOSITION

Intervenor opposes the petition for a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated December 21, 1976, which affirmed the order of the Supreme Court of the State of New York,

New York County, entered on August 4, 1976, which dismissed the complaint due to lack of personal jurisdiction over the defendants and, with respect to jurisdiction obtained under an order of attachment, because the forum was not convenient.

Opinions Below

The opinion of the Supreme Court of the State of New York is unreported and is annexed to the petition (Appendix A, pp. 1a-4a). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department is reported at 55 A D 2d 561 and is annexed to the petition (Appendix A, pp. 5a-11a). The opinion of the New York Court of Appeals dismissing petitioner's appeal as of right to that court is reported at 41 N Y 2d 338 and is annexed to the petition (Appendix A, pp. 11a-13a). Permission to appeal to the Court of Appeals subsequently was denied by the Appellate Division on April 12, 1977 and by the Court of Appeals on July 5, 1977. Those orders are as yet unreported and are annexed to the petitioner's appendix at pages 22a and 24a, respectively.

Jurisdiction

The order of the Court of Appeals denying leave to appeal is dated July 5, 1977. Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3).

Question Presented

Is petitioner's challenge to the New York *forum non conveniens* statute insubstantial and foreclosed by prior decisions of this Court, by the trial court's findings of fact and by petitioner's failure to raise the issue properly in State court?

Statement

The Statement of the facts described in pages 4-8 of the brief of the respondents in opposition is deemed adequate. The Court is respectfully referred to that statement.

Relevant Statute

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in the State of any party to the action shall not preclude the court from staying or dismissing the action." New York Civil Practice Law and Rules 327.

Reasons for Denying the Petition for Certiorari

Petitioner's Challenge to the New York *Forum Non Conveniens* Statute Is Insubstantial and Is Foreclosed by Prior Decisions of This Court, by the Trial Court's Findings of Fact and by Petitioner's Failure to Raise the Issue Properly in State Court.

As stated in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947):

> "This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances"
>
> • • •
>
> "We later expressly said that a state court 'may in appropriate cases apply the doctrine of *forum non conveniens.*' *Broderick* v. *Rosner,* 294 U.S. 629, 643; *Williams* v. *North Carolina,* 317 U.S. 287, 294 n. 5." 330 U.S. at 504.

Although in the application of its *forum non conveniens* statute a state may not discriminate against a particular kind of suit or discriminate against citizens of other states, it may deny access to its courts for reasons of local policy and its "acceptance or rejection of the doctrine of *forum non conveniens* [is] a question of state law not open to review here." *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950).

The doctrine of *forum non conveniens* has often been employed by federal courts to dismiss an action where the other available forum is that of a foreign country. See, *Fitzgerald* v. *Texaco, Inc.,* 521 F 2d 448 (2d Cir. 1975) cert. den. 423 U.S. 1052 (1976); *Yerostathus* v. *A. Luisi, Ltd.,* 380 F 2d 377 (9th Cir. 1967); *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F. 2d 633 (2d Cir.) cert. den. 352 U.S. 871 (1950). ("An American citizen does not have an absolute right under all circumstances to sue in an American Court." 234 F 2d at 645-46); *Harrison* v. *Capivary, Inc.,* 334 F 2d 1141 (E.D. Mo. 1971). New York CPLR 327 is New York's codification of its doctrine of *forum non conveniens* and presents no novel or undecided constitutional issue.

Where no fundamental interest is involved, this court has held that an individual does not have a right to unfettered access to the courts notwithstanding the court's jurisdiction of the subject and the parties. See *United* v. *Kras,* 409 U.S. 434 (1973). *Ortwein* v. *Schwab,* 410 U.S. 656 (1973).*

Petitioner has no more right to access to New York's courts than did Kras to the bankruptcy court or the

* In contrasting Kras' position with that of the plaintiff in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) cited by petitioner, the Court noted that the "[g]overnment's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement, and dissolution of the marriage." 409 U.S. at 445-46.

welfare recipient Ortwein to the Oregon appellate court. Petitioner, in fact, does have a forum to which the trial count found he had access.**

Although "appropriately defined and uniformly applied bona fide residence requirements" *Dunn* v. *Blumstein,* 405 U.S. 330, 342, n. 13 (1972), are permissible, petitioner cites no authority granting a resident a constitutional right to access to the courts of his state of residence. See *Ortwein* v. *Schwab, supra; United States* v. *Kras, supra, Sosna* v. *Iowa,* 419 U.S. 393 (1975).

New York's *forum non conveniens* statute is the same proper exercise of its States' function that has been previously upheld by this court. Review of that issue is foreclosed by those prior decisions, and the petition should be denied. See *Palmer Oil Corp.* v. *Amerada Corp.,* 343 U.S. 390 (1952); *Zucht* v. *King,* 260 U.S. 174 (1922).

Petitioner's real complaint is with the trial court's finding that the petitioner could receive a fair trial in Portugal and that the nexus of events at issue would be more conveniently tried in Portugal for myriad reasons. (See decision of the court, petitioner's appendix 2a-4a). This finding was upheld by all of the Appellate Division judges. Insofar as petitioner requests this court to review the application of CPLR 327 to him, he requests the court to review a factual determination of a State court, a request that generally will not support a petition for certiorari, see *Fry Roofing Co.* v. *Wood,* 344 U.S. 157 (1952); *Grayson* v. *Harris,* 267 U.S. 352 (1952); *Portland R. Co.* v. *Railroad Commission,* 229 U.S. 397 (1913).

Apart from the foregoing, the full record demonstrates that petitioner did not present the constitutional claim alleged here in the trial court. Under New York Law, the

** The trial court conditioned its dismissal on respondents' acceptance of service of process in Portugal, appearance in that court and waiver of any statute of limitations defense.

issue was thus waived. See *Shapira* v. *United Medical Service, Inc.*, 15 N Y 2d 200 (1965); *Flagg* v. *Nichols*, 307 N Y 96 (1954); *Bankers Trust Co.* v. *Martin*, 51 A D 2d 411, 381 N Y S 2d 1001, 1004 (1976) (3rd Dept. 1976), and has been held to preclude review by this Court. *Bailey* v. *Anderson*, 326 U.S. 203 (1945); *Hulbert* v. *Chicago*, 202 U.S. 275 (1906).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 29, 1977

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,
Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Intervenor.

PETITIONER'S REPLY BRIEF

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Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

PETITIONER'S REPLY BRIEF

There is no more fundamental interest than the right of an individual to be able to seek redress for wrongs committed to him in a court with proper jurisdiction.

Mondue v. *New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1911). This right is basic to our judicial system and before that to the common law which arose in the English judicial system. Petitioner is being denied this fundamental right through the application of Rule 327 of the Civil Practice Law and Rules of the State of New York. Petitioner, a long standing resident of the State of New York, sought to avail himself of the use of the courts of his state to recover for wrongful acts committed against him by Respondents.

In spite of the fact that Petitioner was a resident, that both personal* and quasi in rem jurisdiction was obtained over Respondents by personal service of the summons and complaint and the court ordered attachment within the State of New York of obligations due Respondents, that the causes of action against Respondents arose out of business being conducted by Respondents within the State of New York, and New York law would apply, the Court below dismissed Petitioner's complaint before a hearing and the giving of evidence could take place upon the ground of forum non conveniens. Moreover, Petitioner is not just being forced to seek redress for damages in another state which is subject to the guarantees of a fair trial and due process under this country's Constitution, but is being required to travel 6,000 miles to a foreign jurisdiction where, at best, it is *questionable* Petitioner can obtain a fair trial and receive due process.

Petitioner does not deny the power of a court to utilize the doctrine of forum non conveniens in proper circumstances. Rather, Petitioner contends that the New York Courts, in applying the New York Statutes in this case, have acted arbitrarily and in violation of Petitioner's

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* See footnote on page 16 of Petition for Writ of Certiorari.

rights under the due process clause of the United States Constitution. The precepts for the application of the doctrine have been laid out in the bench mark decisions of this Court in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947) and *Koster* v. *Lumberman's Mutual Casualty Co.,* 330 U.S. 518 (1947). The decision in *Gulf Oil* v. *Gilbert, supra,* states that the doctrine of inconvenient forum should be applied only in "exceptional circumstances". The record is clear that no exceptional circumstances exist. Indeed, the application of Rule 327 by the Court below is contrary to all of the principles set forth by this Court in its prior decisions concerning the application of forum non conveniens. *International Milling Co.* v. *Columbia Transportation Co.,* 292 U.S. 511 (1934); *Williams* v. *Green Bay & Western Railway Co.,* 326 U.S. 549 (1946); *Gulf Oil Corp.* v. *Gilbert, supra; Koster* v. *Lumberman's Mutual Casualty Co., supra; Norwood* v. *Kirkpatrick,* 349 U.S. 29 (1955).

The principles outlined by this Court have not been followed and the Petitioner is being denied due process. This Court aply stated in *Gulf Oil Corp.* v. *Gilbert, supra,* (at p. 508 of 330 U.S.):

> "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed".

The mere inconvenience of the defendant is insufficient.

> "[E]ven where the cause is transitory and the plaintiff a resident of the forum state, the convenience to the Court would seem to be outweighed by its duty to entertain actions by it of citizens of the state of which the court is in arm." *Koster* v. *Lumberman's Mutual Casualty Co., supra,* 535.

The Petitioner is a long time resident of the State of New York. The doctrine of forum non conveniens has uniformly never been applied by a state court to its own resident and taxpayer prior to its unique application by the courts of New York. See Restatement, Second, Conflict of Laws §84, Comment f (Proposed Official Draft, Pt. I. 1967); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Columbia L. Rev. (1929); Barrett, *The Doctrine of Forum Non Conveniens,* 35 California L. Rev. 380 (1947); Ryan & Berger, *Forum Non Conveniens in California,* 1 Pacific L.J. 532 (1970); R. Weintraub, *Commentary on the Conflict of Laws,* 157 (1971); Jones, *Forum Non Conveniens,* 54 Texas L. Rev. 737 (1976). Respondents and the Intervenor fail to refer this Court to a single decision where a state court has applied forum non conveniens against its own resident-plaintiff prior to the unprecedented decisions of the New York Courts. With the adoption of Rule 327 of the New York Civil Practice Law and Rules, the Courts of New York have now, apparently, determined to summarily dismiss actions by its residents upon this ground. [See *Irrigation and Industrial Development Corporation* v. *Indag,* 37 N. Y. 2d 522; 337 N. E. 2d 749, 375 N.Y.S. 2d 296 (1975); *Mollendo Equip. Co.* v. *Sekisan Trading Co.,* 7 A. D. 2d 750, 392 N.Y.S. 2d 427 (1st Dept. 1977)].

The fact of Petitioner's residency in New York, however, does not stand alone as the basis for his contention as to constitutional repugnancy. This lawsuit involves entirely the relationship between Petitioner as exclusive representative for the sale of Respondents' products in the United States, and the definition of that relationship. One cause of action is for nothing more than commissions earned for sales in the United States and Canada (2).*

* Figures in parentheses refer to the record on appeal.

All Respondents' sales were conducted through Petitioner, whose business has at all times been located in New York (1, 81). The bulk of the suit involves the right of Respondents to sell to customers located throughout the United States cultivated by Petitioner (2, 81, 158). Respondents' business in the United States involved their participating in arbitrations and hearings in various tribunals in the United States (145-147). At present, they maintain an action integrally related to this one against a corporation owned by Petitioner in the Federal District Court, literally across the street from the State Court which dismissed this action (140-145). Respondents do the overwhelming bulk of their business internationally and more than one-third of it has been done in the United States through Petitioner's business in New York (158). The law applicable is that of the State of New York. The central witnesses are primarily located in the State of New York. None of these factors were present in the *Irrigation* and *Mollendo* cases, *supra.* Accordingly, apart from the novelty of the application by the Courts of the State of New York of the doctrine in the case of a plaintiff resident, in this action those Courts have applied it in a situation and in such a manner as is at odds with even their most recent decisions under the Statute and clearly transgresses the principles laid down by this Court in the *Gulf Oil* and *Koster* cases, *supra.*

Moreover, not only is it questionable that Petitioner can obtain a fair trial and due process in the foreign jurisdiction but there is also question as to the enforceability of any judgment obtained in that foreign jurisdiction, since the Constitution of Portugal expressly favors Respondents and authorizes nationalization and expropriation in favor of Respondents (see Petition, pp. 10-11, Articles 10, 82, 84 and 86 of the Portuguese Constitution).

Petitioner respectfully submits that it is now appropriate and urgent for this Court to determine the constitutional perameters of the application of the doctrine and this case uniquely raises this issue. Certainly dismissal of an action of a plaintiff resident on grounds of the doctrine directly raises the question of its effect upon the Fourteenth Amendment of the United States Constitution. [See *Gregonis* v. *Philadelphia & Reading C & I Co.*, 235 N.Y. 152, 139 N.E. 223 (1923)].

Respondent brief is of no substance. It merely sets forth porcedural arguments as to why this Court should not entertain certiorari. These procedural arguments, even if true, should not be a ground for a denial of certiorari where such a basic right is to access to the courts of one's own jurisdiction is at issue. Respondent brief fails to deal with any of the substantive aspects of the petition.

The brief of the Intervenor is misleading and misapplies the decisions referred therein. It also fails to respond to any of the substantial questions raised by the petition. It is asserted by the Intervenor in his brief (at p. 4) that the decision of the Court below is not subject to review. Intervenor then refers to *Missouri ex rel Southern Railroad Ry. Co.* v. *Mayfield*, 340 U.S. 1 (1950). The Intervenor misleads this Court as to the applicability of the *Missouri* case and misquotes from it. What this Court said in *Missouri* is that a state court may *prefer* access to its courts by its residents over non-residents. Specifically, this Court said in *Missouri* the following (at p. 4 of 340 U.S.):

> "But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all non-residents, whether its own citizens or those of other States, is a choice within its own control".

This Court then went on to say that such a choice of its residents over non-residents is not open to review here. The word "choice" refers to the state court's preference of its own residents over non-residents. The Intervenor has extended this to apply to all cases of forum non conveniens including the denial of access of a state court of its own resident plaintiff.

The other decisions referred to by the Intervenor in his brief are not applicable to the questions raised on this petition. *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975) cert. den. 423 U.S. 1052 (1976); *Yerostathis* v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956) cert. den. 352 U.S. 871 (1956) referred to by the Intervenor in his brief (at p. 4) are not in point. *Fitzgerald* was brought under the Federal Maritime laws by the estate of a German national seeking recovery because of an accident at sea between a German ship and a Panamanian ship. There was already pending in the courts of England substantial litigation between the German ship and the Panamanian ship over this accident. There is nothing in the decision to indicate that the plaintiff was a long standing resident of the jurisdiction of the Court, if at all. The Court applied forum non conveniens because of the existing litigation in the courts of England. Moreover, although it is not expressly stated in the decision, since the plaintiff is not a citizen of this country, the Federal Court would not have had jurisdiction except by reason of the Federal Maritime Statute. Likewise, *Yerostathis* was an admiralty case involving a non-resident foreign national and a foreign ship under the Federal Maritime laws.

In *Vanity Fair* a special situation arose. It involved a claim by an American corporation with respect to the en-

forcement of a trademark infringement in a foreign jurisdiction. The question was really one of jurisdiction and whether the Federal Court could enjoin a foreign national as to activities in a foreign jurisdiction. Because of this the Federal Court dismissed the complaint holding that it was more appropriate for plaintiff to seek his injunction in the foreign jurisdiction where it could be enforced. At bar, Petitioner is seeking recovery for acts committed within the State of New York and there is a court ordered attachment in the sum of $122,000 from which judgment could be satisfied. Incidentally, if Respondents prevail, the attachment will be vacated and Respondents will receive the $122,000. No provision was made by the Court below to maintain this fund and it is very likely that once the attachment is vacated, Petitioner will never be able to satisfy any judgment he could obtain.

Intervenor's brief fails to set forth a single decision where there was the dismissal upon facts similar to this action, involving a resident, where the Court had personal and quasi in rem jurisdiction, where the cause of action arose in the jurisdiction and where the law of the forum state was to be applied.

United States v. *Kras*, 409 U.S. 434 (1973); *Ortwein* v. *Schawb*, 410 U.S. 656 (1973) have no applicability here. Those cases involved plaintiffs who could not afford to pay fees appropriately required by the courts. No such situation exists here. The Petitioner has paid any applicable court fees and is willing to pay all future court fees to prosecute his claims against Respondents. Petitioner is not contending that under no circumstances can a court deny access by reason of necessary fees to its residents. What Petitioner contends is that the application of Rule 327 and the doctrine of forum non conveniens by the Court below is unconstitutional.

It is asserted in Intervenor's brief (at p. 5) that the Petitioner is seeking to have this Court review a factual determination of a state court. This is not the case. What Petitioner seeks is a review of the application of Rule 327 and forum non conveniens by the Court below because it violates the tenets laid down by this Court in *International Milling Co.* v. *Columbia Transportation Co., supra; Gulf Oil Corp.* v. *Gilbert, supra; Koster* v. *Lumberman's Mutual Casualty Co., supra; Norwood* v. *Kirkpatrick, supra.*

The petition has raised substantial questions which should concern this Court. As a result of the application of Rule 327, the Courts of the State of New York are arbitrarily denying access to its residents on an alarming basis. In most cases, access is being denied merely because the resident was doing business with a foreign national without regard as to the principles set down by this Court and whether the resident can obtain a fair trial and due process.

The petition for a writ of certiorari should be granted.

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